Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1995

CLARA PENNY AND WEST SIDE BUILDING CORP., *et al.*,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

MICHAEL D. MONICO*
MONICO, PAVICH & SPEVACK
29 South LaSalle Street
Suite 720
Chicago, Illinois 60603
312-782-8500

*Attorney for Petitioners*

*Counsel of Record

BARRY A. SPEVACK
Of counsel.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTIONS PRESENTED FOR REVIEW

I. THE COURT SHOULD REVIEW THIS CASE BECAUSE IT RAISES AN ISSUE THAT HAS SPLIT THE CIRCUITS SINCE THIS COURT IN *UNITED STATES V. DANIEL GOOD REAL PROPERTY* HELD THAT IT WAS ILLEGAL FOR THE GOVERNMENT TO SEIZE REAL ESTATE WITHOUT FIRST AFFORDING OWNERS A PRE-SEIZURE HEARING, TO WIT: WHETHER THE SEIZURE WITHOUT A HEARING RENDERS THE FORFEITURE PROCEEDINGS A NULLITY, AND THEREFORE REQUIRES THE FORFEITURE ACTION TO BE DISMISSED.

II. THE COURT SHOULD REVIEW THIS CASE AND PROVIDE MUCH NEEDED GUIDANCE TO THE LOWER COURTS REGARDING THE RELATIONSHIP OF HEARSAY EVIDENCE TO THE GOVERNMENT'S RESPECTIVE BURDENS IN A FORFEITURE PROCEEDING.

## LIST OF PARTIES

The parties that have appeared in this case are Clara Penny and West Side Building Corp., and the United States of America. West Side Building Corp. has no parent companies or subsidiary companies. As this is a forfeiture action, the defendants in the case constitute the following items:

ALL ASSETS AND EQUIPMENT OF WEST SIDE BUILDING CORP., 1801 WEST ADAMS STREET, CHICAGO, ILLINOIS, ALL ASSETS AND EQUIPMENT OF H & J CONSTRUCTION CO., 1759 WEST ADAMS STREET, CHICAGO, ILLINOIS; 1801 WEST ADAMS STREET, CHICAGO, ILLINOIS (AND ALL FURNISHINGS THEREIN); 1803 WEST ADAMS STREET, CHICAGO, ILLINOIS; 1251-55 WEST ADAMS STREET, CHICAGO, ILLINOIS; 207, 209, 211 S. THROOP STREET, CHICAGO, ILLINOIS; 2126-28 WEST WARREN BLVD., CHICAGO, ILLINOIS; 1759 WEST ADAMS STREET, CHICAGO, ILLINOIS; 3010 WEST FULTON STREET, CHICAGO, ILLINOIS; 4901 WEST CONGRESS, CHICAGO, ILLINOIS; 1701 WEST WASHINGTON BLVD., CHICAGO, ILLINOIS; ONE 1977 LINCOLN SEDAN, VIN # 7Y82A864232; ONE 1947 FORD COUPE, VIN # 973784; ONE 1980 FORD STATION WAGON, VIN # U15GLGG4803; ONE 1973 CHEVROLET, VIN # 1N47R3J270228; ONE 1979 LINCOLN MARK V, VIN # 9Y895658872; ONE 1986 CHEVROLET, VIN # 1G1BN69H2GY125902; ONE 1981 CHRYSLER, VIN # 2A3BY62J4BR154109; ONE 1974 MERCEDES BENZ COUPE, VIN # 10702412005753; ONE 1986 CHEVROLET RECREATIONAL VAN, VIN # 1GB3G25H6G7179968; ONE 1983 CHEVROLET MOTORHOME, VIN # IGBKP37W5D3332590; BANK ACCOUNTS # 03-3092460, 09-529054, 10-290418, AND 10-479375 IN THE NAME(S) OF "JONATHAN PENNY AND/OR CLARA PENNY" AT CONTINENTAL BANK, 231 SOUTH LASALLE STREET,

**LIST OF PARTIES** – Continued

CHICAGO, ILLINOIS AND ANY AND ALL ACCOUNTS AND/OR SAFE DEPOSIT BOXES IN THE NAMES OF CLARA AND/OR JONATHAN PENNY OVER WHICH JONATHAN OR CLARA PENNY HAVE SIGNATORY POWER AT CONTINENTAL BANK; ACCOUNT # 33054276 IN THE NAME OF CLARA PENNY AT THE FIRST NATIONAL BANK OF CHICAGO, 1 FIRST NATIONAL PLAZA, CHICAGO, ILLINOIS AND ANY AND ALL ACCOUNTS AND/OR SAFE DEPOSIT BOXES IN THE NAMES OF CLARA AND/OR JONATHAN PENNY OR OVER WHICH JONATHAN OR CLARA PENNY HAVE SIGNATORY POWER AT THE FIRST NATIONAL BANK; ACCOUNT # 250712900 IN THE NAME OF CLARA PENNY AT THE FOREST PARK NATIONAL BANK, 7348 WEST MADISON STREET, FOREST PARK, ILLINOIS AND ANY AND ALL ACCOUNTS AND/OR SAFE DEPOSIT BOXES IN THE NAMES OF CLARA AND/OR JONATHAN PENNY OR OVER WHICH JONATHAN OR CLARA PENNY HAVE SIGNATORY POWER AT FOREST PARK NATIONAL BANK; ACCOUNT # 28-009-363-9 IN THE NAME OF JONATHAN AND CLARA PENNY AT TALMON HOME FEDERAL SAVINGS AND LOAN, 5501 SOUTH KEDZIE, CHICAGO, ILLINOIS AND ANY AND ALL ACCOUNTS AND/OR SAFE DEPOSIT BOXES IN THE NAMES OF CLARA AND/OR JONATHAN PENNY OR OVER WHICH JONATHAN AND/OR CLARA PENNY HAVE SIGNATORY POWER AT TALMON HOME BANK; CASH MANAGEMENT ACCOUNT # 635-20372 IN THE NAME OF CLARA PENNY AT MERRILL LYNCH PIERCE FENNER & SMITH, INC., 175 WEST JACKSON BLVD., CHICAGO, ILLINOIS, AND ANY AND ALL ACCOUNTS AND/OR SAFE DEPOSIT BOXES IN THE NAMES OF CLARA AND/OR JONATHAN PENNY OR OVER

**LIST OF PARTIES** – Continued

WHICH JONATHAN OR CLARA PENNY HAVE SIGNATORY POWER AT MERRILL LYNCH; and, ALL BOOK AND RECORDS AND COMPUTER DISKS OR OTHER COMPUTERIZED INFORMATION BELONGING TO JONATHAN OR CLARA PENNY RELATING TO DRUG TRANSACTIONS OR TRAFFICKING.

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No. _____

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*Petitioners,*

v.

UNITED STATES OF AMERICA,

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**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

Petitioners, Clara Penny and the West Side Building Corporation, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

Based upon hearsay evidence filtered through a Chicago Police Officer, the District Court entered an *ex parte* order seizing real estate and personal property belonging to the claimants without affording them a pre-seizure

hearing. The District Court subsequently entered summary judgment based on the same hearsay evidence, 843 F.Supp. 377, and then denied the claimants' motion to reconsider. 1994 W.L. 24319. On June 28, 1995, the Court of Appeals affirmed, although it remanded for a determination for damages based on *James Daniel Good*. The appellate court held that *James Daniel Good* did not, however, require nullification of the entire forfeiture action. 58 F.3d 1181.

## JURISDICTION

The Seventh Circuit Court of Appeals issued its opinion on June 29, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

## STATUTES INVOLVED

The instant case does not expressly address the construction of a statute.

## STATEMENT OF THE CASE

### A. Jurisdiction Below

The United States brought this forfeiture action under Title 21, United States Code, sections 881(a)(5) and (a)(6), invoking the District Court's jurisdiction under Title 28, United States Code, sections 1345 and 1355. It sought property owned by Jonathan Penny, Clara Penny, and the West Side Building Corp. Clara Penny and West

Side Building Corp. filed claims pursuant to Rule (C)(6) of the Supplemental Rule of Civil Procedure. The District Court defaulted Jonathan Penny and later entered summary judgment against Clara Penny and West Side Building Corp.

Appellate jurisdiction was invoked pursuant to 18 U.S.C. 1291.

**B. Relevant Facts**

Citing 21 U.S.C. 881(a)(5) and (a)(6), which empower the government to forfeit books and records used to facilitate narcotics trafficking and property bought with the proceeds from narcotics trafficking, the government moved to forfeit 11 parcels of real estate, 10 vehicles, 7 bank accounts, and numerous articles of personal property owned by Jonathan Penny, his wife Clara Penny, and their corporation, West Side Building Corp. A District Court Judge granted the government's *ex parte* motion for probable cause prior to the seizure.

The forfeiture complaint relied principally on an affidavit supplied by Chicago Police Officer Lawrence Evans. Officer Evans claimed that an unidentified "reliable informant" told him that Clara Penny's husband, Jonathan Penny, distributed cocaine and heroin. Evans swore that the informant told him that Penny once boasted about selling over 20 million dollars worth of narcotics over a 15 to 20 year period. (R.C1, Aff. par. 3). Evans did not reveal the basis for this informant's knowledge.

The same unidentified informant also told Officer Evans that Clara Penny helped the operation, as did the

Penny's son, Michael. (R.C1, Aff. par. 4). At the time, Michael Penny was incarcerated on narcotics charges. (*Id.*).

A second unidentified informant who Evans claimed to have "recently met," told Evans that he had been an "associate" of Jonathan Penny for nearly a decade, and that he had been present when Penny distributed multi-kilogram quantities of narcotics. This "recently met" informant told Evans that Penny had been distributing cocaine generally since 1980. (R.C1, Aff. par. 6).

In what he described as corroboration, Evans related that in December 1987 the New Jersey State Police had stopped a car registered in Clara Penny's name that had 1.5 million dollars in the trunk. (R.C1, Aff. par. 8). A drug sniffing dog reacted positively to the odor of narcotics on the money. Telephone records showed that one of the car's occupants called the Penny home shortly after the stop. (R.C1, Aff. par. 9).

Still another unidentified person – described by Evans not as a confidential informant but as a "source" – told Evans that Penny wore expensive jewelry while serving time in prison. (R.C1, Aff. par. 11). The first unidentified informant added that Clara Penny lived a "lavish lifestyle," receiving whatever she wanted, including a 4 carat diamond ring and expensive clothes. (R.C1, Aff. par. 19).

One of the sources told Evans that Penny told him that he kept a half-million dollars in a strongbox for emergencies, and that Clara Penny spent $30,000 in Atlantic City over a single weekend. (R.C1, Aff. par. 20). A "source of information" told Evans that slightly over a

year earlier Penny had paid a $200,000 cash ransom for the return of his kidnapped daughter, in an incident that Penny did not report to the police. (*Id.*).

Evans said that he reviewed bank and stock records, and determined that the Pennys had acquired large amounts of items disproportionate to the money they earned. (R.C1, Aff. pars. 21-27). Evans alleged that the Pennys had an adjusted gross income of $163,000 from 1983 through 1987, and that there was a net rental loss on the properties in that period of about $22,000. (R.Cl, Aff. at par. 24).

Based on these allegations, the Government obtained its *ex parte* order to seize, among other things, the eleven parcels of real estate in the names of Jonathan Penny, Clara Penny, and/or West Side Building Corp. The Government justified the *ex parte* application by pointing out that "[m]any of the assets . . . are mobile or liquid" and could be liquidated or moved if the Pennys learned of the complaint prior to service of process. (R.C1, par. 1). Contrary to the allegations in the complaint, however, which the Government had based on 881(a)(5) and (a)(6) (R.C1. par. 1), the Government mistakenly moved for probable cause as though the complaint alleged 881(a)(6) and (a)(7). (R.C4).

Process was executed the next day and the seal removed. (R.C8). The real estate seized, all located in Chicago, Illinois, included the following:

**1801 West Adams Street**

The government seized the Penny's personal residence at 1801 West Adams. One of the unidentified informants told Officer Evans that the Penny home had gold fixtures, Italian tiles, Persian rugs, a sunken tub and jacuzzi in a finished basement, and a large satellite dish on the roof for which the Pennys paid, according to the informant, $20,000. (R.C1, Aff. at Pars. 13, 16(a)). Evans also found a financial statement on which Clara Penny had valued the home at $300,000. (R.C1, Aff. par. 16(a)). Evans did not indicate when the Pennys purchased the home or how much they paid for it.

**1803 W. Adams**

The government seized 1803 W. Adams, after determining that the building had undergone extensive renovations in 1984. (R.C1, Aff. at 16(b)). The government did not indicate how it came to know that the building had undergone extensive renovation in 1984, or whether the renovation occurred before or after the Pennys acquired it. Neither Evans' affidavit nor the complaint stated when the Pennys acquired the building or how much they paid for it.

**1757-59 W. Adams**

The government claimed that the Pennys constructed this building in 1986. (R.C1, Aff. 16(c)). Officer Evans did not disclose how he came upon this knowledge, but it appeared to be from one of the unidentified informants who told him that the reconstruction cost $800,000. (R.C1,

Aff. at par. 16(c)). Evans did not reveal how he determined that the informant's information was reliable.

**2126-28 W. Warren**

The government seized this building based on Officer Evans' statement that Clara Penny had purchased it at some unspecified time and that it now had an estimated value of $250,000. (R.C1, Aff. at 16(d)). When Clara Penny bought the building, or how much she paid for it, the officer did not state. Nor did he explain the basis for the estimated valuation.

**3010 W. Fulton**

The government seized 3010 W. Fulton based on Officer Evans assertion that Clara Penny had purchased it in 1985, and that it had an estimated value of $250,000. (R.C1, Aff. par. 16(e)). He did not state how much she paid for it, or the basis for determining the value.

**4901 W. Congress**

The government seized this building based on Officer Evans' statement that it was a two-story brick building built in 1986 that had an estimated value of $230,000. (R.C1, Aff. at par. 16(f)). Once again, Officer Evans did not say who acquired the building, how it was acquired, or how he determined its worth.

**1701 W. Washington Street**

The allegations here were similar to the allegations with regard to 4901 W. Congress. Officer Evans described the property as a newly renovated three story apartment building with an estimated net value of $150,000. (R.C1, Aff. at par. 16(g)). And, once again, Evans did not say who acquired it, how it was acquired, when it was acquired, and how he estimated the value.

**207, 209, 211 S. Throop Street**

The government justified the seizure of these three buildings after alleging that they were worth approximately $150,000 in total. (R.C1, Aff. at par. 16(h)). Evans did not state how the Pennys happened to own these properties, when they acquired them, and how he determined their values.

Clara Penny and West Side Building Corp. moved to dismiss the complaint, alleging that it failed to adequately allege probable cause. The government responded that the District Judge had made a preliminary finding of probable cause at the *ex parte* hearing; it argued that it did not have to actually *establish* probable cause until the trial. The government argued that at this stage of the proceedings its complaint only had to establish a reasonable belief that the property was forfeitable. (R.C56 at 2). The court denied the claimants' motion.

Claimants eventually answered the complaint and raised certain affirmative defenses, including the fact that some of the properties seized had been purchased prior to the advent of the forfeiture statutes and that some had

been given to Clara Penny by her father. (R.C106 at 11). The government responded with an amended complaint that added allegations under 881(a)(7). (R.C147 at 1). Thus, the government sought to defuse the defense that some properties were purchased legally with the additional allegation that they were forfeitable because they were used to facilitate narcotics trafficking, allegations the government did not make in the original complaint that had been the *ex parte* basis for the forfeiture.

The amended complaint added some new allegations, such as that the Pennys' daughter had married a drug dealer and that their son had been arrested on drug charges. (R.C147, Aff. pars. 4-5). It also appeared that sometime after the seizure the government had discovered that two of the homes had what the Government described as secret laboratories. (R.C147, Aff. par. 12). The new complaint deleted, however, the allegation about the Pennys' daughter having been kidnapped and the Pennys paying the ransom without calling the police.

On August 16, 1993, the Government moved for a default decree of forfeiture and for summary judgment. (R.C178). Clara Penny and West Side Building Corp. sought continuances under Rule 56(f) in order to obtain affidavits and documentary evidence that would show that some of the properties were gifts or were acquired prior to the forfeiture statutes' effective dates. Clara Penny also sought some form of immunity to enable her to testify: she was forced to take the Fifth Amendment at her deposition because since filing the forfeiture the government had initiated a criminal action against her husband, Jonathan Penny, that was pending at the same time as the Government's motion for summary judgment.

(R.C185 at 3-4). The District Court denied these requests and entered summary judgment.

The claimants appealed and the Seventh Circuit affirmed in part and reversed in part. It affirmed the grant of summary judgment, but remanded the case to the District Court to determine whether the claimants were entitled to damages for the period of time that the property had been seized based on the *ex parte* probable cause finding. The Court rejected the notion, however, that the initial seizure without a hearing nullified the entire forfeiture proceeding. (App. A, slip op. at 20-23).

## REASONS FOR GRANTING THE WRIT

### I.

### THE COURT SHOULD REVIEW THIS CASE BECAUSE IT RAISES AN ISSUE THAT HAS SPLIT THE CIRCUITS SINCE THIS COURT HELD IN *UNITED STATES V. DANIEL GOOD REAL PROPERTY* THAT IT WAS ILLEGAL FOR THE GOVERNMENT TO SEIZE REAL ESTATE WITHOUT FIRST AFFORDING OWNERS A PRE-SEIZURE HEARING, TO WIT: WHETHER THE SEIZURE WITHOUT A HEARING RENDERS THE FORFEITURE PROCEEDINGS A NULLITY, AND THEREFORE REQUIRES THE FORFEITURE ACTION TO BE DISMISSED.

The Government seized the property in this case without a pre-seizure hearing. Claimants moved to dismiss the complaint, and the government and the Court relied upon that pre-seizure probable cause finding to deny the claimants' motion to dismiss.

Following this Court's decision in *United States v. James Daniel Good Real Property*, 114 S.Ct. 492 (1993), the Seventh Circuit held that the seizure without notice was improper. The court did not believe, however, that this infirmity necessitated the nullification of the entire proceeding. Yet the Seventh Circuit also acknowledged a split in the Circuits with regard to this issue:

> [T]he cases reflect some difference in approach on this issue. The Eighth Circuit is of the view that *Good* requires dismissal of the forfeiture action with leave to file a new action if the statute of limitations has not run. *See One Parcel of Real Property, Located at 9638 Chicago Heights*, 27 F.3d 327, 330 (8th Cir. 1994). The Second, Third, and Ninth Circuits take the view that the illegal seizure does not, standing alone, require that the property be immune from forfeiture. *See 20832 Big Rock Drive*, 51 F.3d at 1406; *United States v. Premises Known as RR #1*, 14 F.3d 864, 869 n.5 (3d Cir. 1994); *United States v. Premises and Real Property at 4492 Livonia Rd.*, 889 F.2d 1258, 1265-66 (2d Cir. 1989). Under this view, the government is responsible, however, for the profits of which the claimant was deprived during the period of illegal seizure. We believe this latter approach provides an effective, but measured, remedy for the violation of the claimant's rights.

Slip op. at 23.

The split of authority that the Seventh Circuit recognized above has grown. Now, not only the Eighth Circuit, but it appears that the Sixth Circuit is leaning toward the view that the seizure of property without a pre-seizure hearing nullifies the forfeiture. *See United States v. Certain*

*Real Property Located at 16510 Ashton*, 47 F.3d 1465 (6th Cir. 1995). *See also United States v. Real Estate 2030 E. Monroe, Springfield*, 884 F.Supp. 1218 (C.D.Il. 1995) (recognizing the conflict).

Meanwhile, the courts adopting views on the matter are becoming entrenched in their positions. *See, e.g., United States v. Real Property Located at El Dorado County*, 1995 W.L. 408578 (9th Cir. 1995) (reaffirming position that *Good does not* require nullification of action); *United States v. One Parcel of Real Property with Buildings, Appurtenances and Improvements*, 48 F.3d 1465 (8th Cir. 1995) (reaffirming position that *Good does* require nullification of action).

Accordingly, the circuits have drawn battle lines on an issue badly in need of this Court's guidance. The matter concerns real property – including homes and businesses seized by the government – and numerous cases still pend in which such seizures have occurred. Thus, the stakes are significant and the disagreement among the Circuits striking.

Meanwhile, side issues abound: the Ninth Circuit, for instance, in holding that the lack of a pre-seizure hearing does *not* require nullification of the forfeiture, has nevertheless held that evidence discovered as a result of the seizure must be suppressed. *United States v. Real Property Located at 20832 Big Rock Drive*, 51 F.3d 1402, 1406 (9th Cir. 1995). In the instant case, the claimants had argued that the government had searched the property and located hidden rooms with drug paraphernalia, and then used this evidence in support of its motion for summary judgment. The Seventh Circuit did not directly address this issue.

Given the clear conflict in the Circuits, petitioners respectfully request that this Court grant this writ of certiorari.

## II.

## THE COURT SHOULD REVIEW THIS CASE AND PROVIDE MUCH NEEDED GUIDANCE ON THE RELATIONSHIP BETWEEN HEARSAY AND THE GOVERNMENT'S BURDEN OF PROOF

This instant case also presents other issues that have arisen routinely in the forfeiture setting and that have not been addressed by this Court. Most significantly is the relationship between hearsay testimony and the government's burden of proof. Most lower courts have allowed the government to use hearsay in order to meet the probable cause showing necessary to institute forfeiture. *See, e.g., United States v. $200,000 Representing Contents of Annuity,* 805 F. Supp. 585, 589 (N.D. Il. 1990). Others require some substantial basis to credit the hearsay. *United States v. Parcel of Land & Residence at 28 Emery Street,* 914 F.2d 1, 5 (1st Dist. 1990); *United States v. Certain Real Property,* 791 F.Supp. 324, 326 (D.Me. 1992). These latter courts maintain that while probable cause may be based on inadmissible evidence, the evidence must still be reliable. *United States v. Pole No. 3172 Hopkinton,* 852 F. 2d 636, 639 (1st Cir. 1989); *United States v. Property Located at 15 Black Ledge Drive,* 897 F.2d 97, 101 (2d Cir. 1990).

In the instant case, the government established probable cause for forfeiture almost entirely based on hearsay evidence. The government provided valuations of the claimants' real estate without any indication as to how

those evaiuations came to be made or who made them. The government made allegations of narcotics trafficking based on three unidentified sources, only one of whom the government actually described as "reliable." The case therefore raises questions regarding how nebulous the evidence can be and still entitle the government to effectuate a forfeiture.

Indeed, this question will remain regardless of the Court's answer to the first question this petition raises. It addresses the quality of evidence the government must produce to justify the initial seizure at the pre-seizure hearing *James Daniel Good* envisions.

Moreover, this case raises questions regarding the place of hearsay *after* probable cause for the initial seizure has been established. In *United States v. $12,390.00*, 956 F.2d 801, 808 (8th Cir. 1992), for instance, Judge Beam, in a dissenting opinion, while agreeing that hearsay was admissible at the pleading stage, questioned whether such evidence could be admissible at the trial itself. *See also* Smith, *Prosecution and Defense of Forfeiture Cases*, Vol. 1, par. 11.03 at 11.22 through 11-5 (questioning whether hearsay may be used for anything beyond probable cause to initiate the seizure).

The trial court decided the instant case on summary judgement, using the same evidence that it used to approve the initial seizure. Real and personal property were thereupon forfeited based entirely on hearsay. The use of hearsay and otherwise inadmissible evidence to lead to such a result should finally be reviewed by this court.

## CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

CLARA PENNY AND WEST SIDE BUILDING CORP.

MICHAEL D. MONICO
MONICO, PAVICH & SPEVACK
29 South LaSalle Street
Suite 720
Chicago, Illinois 60603
312-782-8500

BARRY A. SPEVACK
Of Counsel

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-1377

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

ALL ASSETS AND EQUIPMENT OF
WEST SIDE BUILDING CORP., et al.,

Defendants,

APPEAL OF:

CLARA PENNY and WEST SIDE
BUILDING CORP.,

Claimants-Appellants.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 89 C 2736 – Charles P. Kocoras, Judge.

ARGUED NOVEMBER 9, 1994 –
DECIDED JUNE 29, 1995

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Before RIPPLE and MANION, *Circuit* Judges, and SKINNER, District *Judge.**

RIPPLE, Circuit Judge. In this forfeiture action, the district court granted summary judgment to the United States and entered final judgment against the claimants Clara Penny and the West Side Building Corporation (collectively, "claimants" or "Mrs. Penny") on their

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* The Honorable Walter Jay Skinner of the United States District Court is sitting by designation.

claims to vehicles, real estate and personal properties. The court ordered that the defendant properties be forfeited to the United States. Mrs. Penny appeals the district court's summary judgment determination and its denial of claimants' motion for reconsideration. For the reasons presented below we affirm in part and remand in part.

## I

## BACKGROUND

### A. Verified Complaint and Affidavit

On April 4, 1989, the United States government filed a verified complaint and supporting affidavit to initiate forfeiture proceedings against the defendant's real and personal properties located in Illinois. The complaint alleged that Jonathan and Clara Penny, husband and wife, were involved in narcotics distribution activities for the past decade. It also alleged that drug trafficking was a "family business" in which Clara Penny managed the business aspects, setting the prices and investing the proceeds, and in which their son Michael was involved. In fact, according to the complaint, both father and son had been incarcerated on narcotics charges. The defendant properties, worth perhaps $3.5 million,[1] were

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[1] The worth of the Pennys' assets, which are itemized or described in detail in the complaint, was alleged thus:

> The Pennys have used the proceeds from narcotics trafficking to acquire substantial assets including real estate conservatively valued at $2,000,000.00, bank and stock accounts worth approximately $470,000, eight automobiles as well as a motorhome worth approximately $100,000 and a recreational van. Penny

alleged to be the fruits of the large-scale narcotics trafficking operation run by the Pennys. The complaint recited that Clara Penny was employed as a mail handler, and yet she drove a Mercedes Benz. Because the Pennys' modest legitimate reported income could not explain the acquisition of those assets or the Pennys' lavish lifestyle, the complaint alleged that there was probable cause to believe that the assets constituted proceeds of illicit drug transactions and records of those activities that were forfeitable to the government under 21 U.S.C. §§ 881(a)(5)and (6).[2]

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has boasted that he maintains $500,000 to $750,000 in cash hidden away.

R.1 at 17. The estimated total worth of the property is $3.5 million. R.1 Aff. at 1 28.

[2] We note that the government brought its complaint under §§ 881(a)(5) and (6), which list as forfeitable property "all books, records, and research" and "all moneys, negotiable instruments, securities, or other things of value," including their proceeds, used or intended to be used in narcotics transactions. R.1. Yet the complaint clearly itemized vehicles and real estate among the property. The district court's seizure order found probable cause under (a)(6) and (7), thereby including real property "used, or intended to be used. . . . to commit, or to facilitate the commission of" illegal drug activity. R.4. Then the court's summary judgment ruling added § 881(a)(4), which treats as forfeitable property all conveyances that transport or intend to transport drug materials. R.194. This lack of care on the part of the government is hard to understand. However, Mrs. Penny did not object or claim to have been misled concerning the clearly identified property sought for forfeiture. Nor did she claim not to have received notice concerning seized property. Thus she was not prejudiced by a citation to the wrong portion of the statute. Cf. *Hollenback v. United States*, 987 F.2d 1272, 1280 (7th Cir. 1993) (concluding that counsel's reference to erroneous subsection did not result in unreliable result); *United States v.*

Filed with the complaint was the affidavit of Chicago Police Officer Lawrence Evans, a member of the Drug Enforcement Administration/Chicago Police Department Joint Task Force on Narcotics. Following his investigation of the Pennys' narcotics operation, this forfeiture action and, later, the indictment of Jonathan Penny on federal drug trafficking charges were initiated. In his affidavit, Officer Evans reported, in detail, information concerning the Pennys' drug trafficking that he had learned from a "reliable informant" who had known the Pennys for years.[3] According to that informant, Jonathan Penny told him that, in the drug business, you put everything in your wife's name. Officer Evans' check of the titles to the Pennys' real estate and automobiles revealed that many of their assets were in the name of Clara Penny or West Side Building Corporation ("West Side"). From a second informant, an associate of Jonathan's for almost a decade, Officer Evans learned that Jonathan had been distributing multi-kilo quantities of cocaine since 1980. A third source described to Officer Evans the lavish lifestyle of the

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*Lim*, 984 F.2d 331, 337 (9th Cir.), cert. denied, 113 S. Ct. 2944 (1993) (allowing amendment of indictment). The mistake is therefore harmless, and we shall treat the changes made by the district court as correction of a scrivener's error, *see* Fed. R. Civ. P. 60(a).

[3] This informant told Officer Evans that Jonathan Penny had been distributing cocaine and heroin for fifteen or twenty years, and had boasted that he had sold over 20 million dollars worth of narcotics. According to the informant, Clara Penny was also involved in the drug distribution because she had a "head for figures," and their son Michael Penny had been caught transporting heroin and a ledger book documenting drug sales.

Pennys, the elegant furnishings of their home, and the expensive restoration of their other realty. In addition, independent information that corroborated the allegation of a history of drug trafficking included the police records of both Jonathan and Michael Penny.

Officer Evans reviewed the Pennys' bank and stock records, and learned that large deposits of cashiers checks were made into their account in 1985 and 1986, and that checks for $75,000 were written to contractors working on the Pennys' property. After reviewing the Pennys' tax returns, Officer Evans pointed out that Clara's paycheck as a mail handler was the couple's only legitimate income, and that their reported adjusted gross income was far less than their deposits in bank and stock accounts.

B. Course of Proceedings

On April 4, 1989, the district court granted the government's ex parte motion[4] for forfeiture of the defendant properties. The court determined there was probable cause to believe the property described in the complaint was subject to forfeiture under §§ 881(a)(6) and (7),[5] and

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[4] Some of the property involved was realty. However, this order antedated by several years the Supreme Court's decision in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993).

[5] The subsections of the forfeiture statute pertinent to this case provide:

> § 881. (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

executed the warrant of seizure. Mrs. Penny filed a verified claim to the property on behalf of herself and West Side, of which she is the sole director.[6] She then sought dismissal of the complaint. Following full briefing on the issues, the district court denied claimants' motion to dismiss. The court found that the allegations were sufficiently detailed to comply with the pleading requirements for forfeiture laid out in Supplemental Rule

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(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport . . . [controlled substances, etc.]. . . .

(5) All books, records, and research . . . which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be used by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange. . . .

(7) All real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter. . . .

[6] Jonathan Penny is not a party to this action. He failed to file a claim on the property; thus the court entered a default decree of forfeiture as to his interests in the seized properties on August 15, 1990. He was convicted on federal drug trafficking charges on September 10, 1993; the appeal of that conviction is under advisement in this court. The district court declared that, because Clara Penny represented both herself in her individual capacity and West Side as its president, the court's opinion would bind both Mrs. Penny and West Side.

(E)(2)(a).[7] It also declined to disturb the court's initial finding of probable cause.

On July 30, 1991, the government filed an amended complaint and the supporting affidavit of Officer Evans. For the most part, it realleged the allegations of the original complaint. However, it provided additional detailed allegations that the properties were used to facilitate drug trafficking. According to this complaint, Chicago police detectives reported to Officer Evans that Jonathan Penny was a source of narcotics to two major west side dealers. One of those dealers, Andre Jackson, informed Officer Evans that Jonathan Penny had taught him how to run Jackson's father's drug business, and had described the location of secret drug laboratories hidden in two of the Pennys' buildings-labs that United States marshals had found in 1990. Jackson also stated that drug profits were used to restore the buildings.

The district court's opinion of November 23, 1993[8] denied Mrs. Penny's request for a continuance because the claimants had not submitted the required affidavit

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[7] The Supplemental Rules for Certain Admiralty and Maritime Claims apply to forfeiture actions under 21 U.S.C. § 881(b)(l). *See United States v. U.S. Currency, The Amount of $103,387.27*, 863 F.2d 555, 558 n.4 (7th Cir. 1988). Supplemental Rule E(2)(a), applicable to forfeiture proceedings, requires that the complaint "shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading."

[8] *United States v. All Assets & Equipment of West Side Bldg. Corp.*, 843 F. Supp. 377 (N.D. Ill. 1993).

and because they had been given continuances for the review of documents previously. The court then granted the government's motion for summary judgment on several grounds.

First, the court noted that Mrs. Penny had failed to file a 12(n) statement, and was therefore deemed to have admitted the government's 12(m) facts-an admission that would dictate summary judgment. It then awarded the government summary judgment on the merits. It noted that the court had found probable cause twice before, and that the government had thus met its burden. In evaluating whether Mrs. Penny's evidence met the burden that had shifted to her, the court considered her defenses and determined that each one failed.[9] It therefore granted summary judgment to the government pursuant to 21 U.S.C §§ 881(a)(4), (6) and (7), and ordered all of the defendant property forfeited.

The court later denied Mrs. Penny's motion to reconsider. It noted that, when responding to the government's motion for summary judgment, Mrs. Penny had not challenged the government's contention that the burden of proof had shifted to her. The court now rejected her submission that there had not been a finding of probable cause, and therefore that the burden of proof had been

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[9] Mrs. Penny raised defenses of innocent ownership, legitimate acquisition of the property, and legitimate income. She does not challenge on appeal the district court's conclusion that those defenses were unsupported. Nor does she raise issue with the court's denial of her request for immunity from prosecution or its rejection of her argument that the forfeiture was out of proportion to the crimes committed.

shifted improperly to Mrs. Penny. The court offered two reasons for refusing to accept that position. First, it clearly could have been raised earlier, in response to the motion for summary judgment. Second, Mrs. Penny could not have prevailed on a probable cause challenge because there was sufficient evidence to support a probable cause determination under §§ 881(a)(4), (6) and (7). Finally, the court refused to entertain Mrs. Penny's argument that, under *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993), she was entitled to damages because she did not receive a pre-seizure hearing.

## II

## DISCUSSION

Mrs. Penny raises three issues on appeal. She first submits that the district court erred in its probable cause rulings. She also contends that the court abused its discretion by refusing to grant claimants a continuance under Rule 56(f). Finally she suggests that the court should have assessed damages against the government under *James Daniel Good*.

In forfeiture cases, as in all others, we review de novo the district court's entry of summary judgment. *United States v. One Parcel of Land Located at 7326 Highway 45 North*, 965 F.2d 311, 314 (7th Cir. 1992). In our consideration of the record, " 'the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Summary judgment is appropriate when

there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *United States v. Two Plastic Drums, More or Less of an Article of Food*, 984 F.2d 814, 816 (7th Cir. 1993). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted).

Because the issues of probable cause and damages were raised for the first time in claimants' motion to reconsider, however, Mrs. Penny also requests our review of the district court's denial of that motion. We review a judgment on a motion to reconsider for abuse of discretion. *Hope v. United States*, 43 F.3d 1140, 1144 (7th Cir. 1994), cert. denied, ___ S. Ct. ___, 63 U.S.L.W. 3871 (U.S. June 12,1995) (No. 94-1883); *Mares v. Busby*, 34 F.3d 533, 535 (7th Cir. 1994).

A. Probable Cause

Mrs. Penny first challenges the district court's probable cause determination. She submits that the government must have probable cause, based on the facts alleged at the time the government brings the forfeiture action, to believe that the defendant property was involved in the activity that the forfeiture statute forbids. Thus, claims Mrs. Penny, the government was required to show that the Pennys had acquired each piece of forfeited property with the proceeds of narcotics transactions. In her view, the government did not meet that burden; it did

not establish a direct nexus between the Pennys' alleged drug dealings and the purchase of certain property. Instead, the government sought forfeiture based on the unverified hearsay allegations of informants and the estimated valuation of the property-evidence that is inherently unreliable in any proof that the properties were purchased with drug proceeds. Mrs. Penny also contends that her husband's prior convictions for drug possession cannot sustain the notion that all the property that came into his and his wife's possession was connected to that drug activity.

Mrs. Penny further submits that the district court, when making its summary judgment ruling, improperly shifted the burden to the claimants without first making a determination that the government actually had established probable cause. According to Mrs. Penny, the district court, when ruling on claimants' motion to dismiss, simply had determined that the complaint alleged probable cause, but not that probable cause existed. Mrs. Penny contends that, when the district court finally did analyze the evidence with respect to probable cause in its order denying claimants' motion to reconsider, it erroneously based its probable cause finding on the cumulative evidence and allegations found in the amended complaint and the government's 12(m) statement rather than on the allegations of the original complaint. As Mrs. Penny submits, "[t]he trial court erred when it jumped right to the conclusion that the Pennys had to rebut the probable cause finding without first determining whether a probable cause finding was warranted." Claimants' Br. at 31.

2.

The forfeiture provision of the Comprehensive Drug Abuse Prevention & Control Act of 1970 ("Drug Act"), 21 U.S.C. § 881, establishes that property used to commit or to facilitate a violation of the Drug Act, including proceeds traceable to narcotics trafficking, is subject to forfeiture. The forfeitable property includes vehicles (§ 881(a)(4)), books and records (§ 881(a)(5)), personal property (§ 881(a)(6)) and real property (§ 881(a)(7)). The legislation, "designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States," allows the government to remove the profits (and thus the incentive) of drug trafficking. H.R. Rep. No. 1444, 91st Cong., 1st Sess. 1 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4567;[10] *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686-87 (1974) (noting that "[f]orfeiture of conveyances that have been used – and may be used again – in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby

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[10] The statute gives the Attorney General such authority as "administrative inspections, forfeitures, and execution of search warrants, including authority to enter premises without giving notice of authority and purpose if a judge or U.S. magistrate has authorized such entry in the warrant after determining that there is probable cause to believe that –

> (1) property sought may and, if notice is given, will be easily and quickly destroyed or disposed of, or
> (2) the giving of such notice will immediately endanger the life or safety of the executing officer or another person."

H.R. Rep. No. 1444, 1970 U.S.C.C.A.N. at 4570-71.

rendering illegal behavior unprofitable"); *United States v. $40,874.59 in U.S. Currency*, 32 F.3d 1151, 1157 (7th Cir. 1994) (commenting that "forfeiture act is a formidable weapon in the government's arsenal, and when properly enforced, serves the public good," and that property illegally obtained or used to promote illegal activities should be forfeited to the United States government so that "[c]riminals [do] not profit from their crimes").

> The obvious purpose of the [forfeiture] statute read as a whole is to deprive drug traffickers of the principal tools of their trade, which include the drugs themselves, the equipment and raw materials for their manufacture, the firearms used to enforce contracts in an illegal business, the premises used for making and selling drugs – and the vehicles, boats, and aircraft that the traffickers use in their business.

*United States v. 1990 Toyota 4Runner*, 9 F.3d 651, 653 (7th Cir. 1993).

The procedures by which the government attaches property through forfeiture proceedings are well established. The statute offers three ways of instituting such proceedings: (1) following the procedure presented in the Supplemental Rules under § 981(b); (2) obtaining a court-ordered seizure warrant under Rule 41(c) of the Federal Rules of Criminal Procedure; and (3) seizing the property without judicial process "when the Attorney General has probable cause to believe the property is subject to civil forfeiture." 21 U.S.C. § 881(b)(4). *See United States v. Daccarett*, 6 F.3d 37, 46 (2d Cir. 1993), cert. denied, 114 S. Ct. 1294 (1994). Of course, probable cause is required to initiate a forfeiture action, no matter which method is

followed. The probable cause threshold in a drug forfeiture case is the same as that applicable elsewhere, *United States v. Edwards*, 885 F.2d 377, 390 (7th Cir. 1989), and is one in which the burden of proof has been clearly set forth.[11] The government, as the party seeking the forfeiture, has the preliminary responsibility; "the government's initial burden is to establish probable cause to believe that the property is subject to forfeiture." *United States v. $94,000 in U.S. Currency*, 2 F.3d 778, 782 (7th Cir. 1993) (citing *United States v. On Leong Chinese Merchants Assn Bldg.*, 918 F.2d 1289, 1292 (7th Cir. 1990), cert. denied, 502 U.S. 809 (1991)). To show probable cause, the government must demonstrate to the court that it has "reasonable ground for the belief of guilt supported by less than facie proof but more than mere suspicion." Id. In this showing, the government may rely not only on direct evidence but also on circumstantial evidence, id. at

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[11] 19 U.S.C. § 1615 (1988), incorporated into the Drug Act pursuant to § 881(d), presents the allocation of the burden of proof in forfeiture proceedings. In pertinent part it provides:

> In all suits or actions . . . brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of [any such property] because of violation of any such law, the burden of proof shall be upon the defendant: Provided, That probable cause shall be first shown for the institution of such suit or action, to be judged by the court.

783 n.2, and on hearsay evidence.[12] Probable cause for the forfeiture exists if the government demonstrates a nexus between the seized property and illegal narcotics activity.[13] *United States v. Certain Real Property, Commonly*

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[12] The vast majority of circuits have held explicitly that the government is permitted to present hearsay evidence when proving probable cause in a forfeiture action. *See, e.g., United States v. One 1973 Rolls Royce, V.LN. SRH-16266*, 43 F.3d 794, 805 (3d Cir. 1994); *Daccarett*, 6 F.3d at 56; *United States v. One 1982 Chevrolet Corvette*, 976 F.2d 392, 392 (8th Cir. 1992); *United States v. One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496, 1501 (11th Cir. 1992); *United States v. One 1986 Chevrolet Van*, 927 F.2d 39, 42 (lst Cir. 1991); *United States v. One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990); *United States v. One Parcel of Real Estate Located at 7715 Betsy Bruce Lane*, 906 F.2d 110, 113 (4th Cir. 1990); *United States v. Parcel of Real Property Known as 6109 Grubb Rd.*, 886 F.2d 618, 622 (3d Cir. 1989); *United States v. $5,644,540 in U.S. Currency*, 799 F.2d 1357, 1362 (9th Cir. 1986). A finding of probable cause based on hearsay and on circumstantial evidence may be the only proof available in cases involving bank accounts, money, or other fungible assets, in order to reveal unexplained wealth in conjunction with evidence of drug trafficking. *See Daccarett*, 6 F.3d at 56 (citing cases).

[13] There is some disparity among the circuits concerning the level of proof above "mere suspicion" to which probable cause must rise. The cases say that the government must demonstrate that there is either a "nexus" or a "substantial connection" between the seized property and the illegal drug activity. The Second Circuit has considered the difference in terminology in depth and has decided that the government need prove only a "nexus" between the seized property and the illegal drug activity. *Daccarett*, 6 F.3d at 55-56. This circuit agrees that a "nexus," and not a "substantial connection," is required between the property and the drug-related offense. *6250 Ledge Rd.*, 943 F.2d at 725. Many courts require a nexus, without significant discussion; decisions in some other circuits leave the

*Known as 6250 Ledge Rd.*, 943 F.2d 721, 725 (7th Cir. 1991) (requiring demonstration of nexus that is more than incidental between property and drug-related offense); *United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Ave.*, 903 F.2d 490, 494 (7th Cir. 1990), cert. denied, 498 U.S. 1126 (1991) (same).

Once the government meets its burden, "the ultimate burden shifts to the claimant to prove by a preponderance of the evidence that the property is not subject to forfeiture," *$94,000 in U.S. Currency*, 2 F.3d at 782-83, by demonstrating that the property was not used in connection with drug activities. *See 6250 Ledge Rd.*, 943 F.2d at 725; *On Leong*, 918 F.2d at 1293; *United States v. $84,000 U.S. Currency*, 717 F.2d 1090, 1101 (7th Cir. 1983), cert. denied, 469 U.S. 836 (1984). If the claimant fails to rebut the government's proof, that showing of probable cause alone will support a judgment of forfeiture. *On Leong*, 918 F.2d at 1292; *see also United States v. Certain Real Property 566 Hendrickson Blvd.*, 986 F.2d 990, 995 (6th Cir. 1993) (collecting cases); *United States v. One 1982 Chevrolet Corvette*, 976 F.2d 392, 392-93 (8th Cir. 1992) (holding that agent's affidavit for determining probable cause was not

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issue unresolved. Compare, e.g., Sixth Circuit cases (*United States v. Real Property Known and Numbered as 429 South Main Street*, 52 F.3d 1416, 1418, 1423 (6th Cir. 1995) (nexus) with *United States v. Certain Real Property Located at 16510 Ashton*, 47 F.3d 1465, 1469 (6th Cir. 1995) (substantial connection)), and Fourth Circuit cases (*United States v. Chandler*, 36 F.3d 358, 362 (4th Cir. 1994), cert. denied, 115 S. Ct. 1792 (1995) (nexus) with concurring opinion, 36 F.3d at 368 (substantial connection) and *United States v. Bizzell*, 19 F.3d 1524, 1527 n.6 (4th Cir. 1994) (same)).

rebutted by claimant's blanket denial of drug trafficking activity).

3.

Applying these standards to the case before us, then, we note that the government, complying with the Supplemental Rules, filed a verified complaint in the district where the seizure was to occur, and the court authorized a warrant "of seizure and monition issued pursuant to Rule C of the Admiralty Rules." R.4. The court later held, in its order denying claimants' motion to dismiss, that the complaint complied with the particularity requirements for pleadings presented in Supplemental Rule E(2)(a).

We agree with the district court that probable cause was sufficiently demonstrated. When evaluated in light of the Pennys' known drug activity, the great discrepancy between the Pennys' legitimate income and the value of the defendant assets that they had acquired, improved and maintained presented a reasonable ground for believing that there was a nexus between the property seized and the narcotics activity to which the Pennys were linked. Contrary to Mrs. Penny's contention, "[a] direct connection between the property subject to seizure and the illegal activity that renders the items forfeitable need not be shown in order to establish probable cause." *Edwards*, 885 F.2d at 390. Significantly, we have held that,

> where a defendant's verifiable income cannot possibly account for the level of wealth displayed and where there is strong evidence that the defendant is a drug trafficker, then there is probable cause to believe that the wealth is

> either a direct product of the illicit activity or that it is traceable to the activity as proceeds.

Id. Evidence of prior convictions for drug possession or trafficking is certainly admissible in a probable cause determination. In addition, hearsay testimony may properly be considered in a probable cause showing. Information from confidential sources is often proffered as part of the basis for probable cause; the district court must decide whether that information was sufficiently reliable and adequate by considering the informant's previous "track record" and the totality of the circumstances. See id. (stating that "probable cause analysis looks to the totality of the circumstances surrounding the situation"). In this case, at least four of the informants reported their first-hand observations, and some of their information overlapped or was independently corroborated. Those statements thus have indicia of reliability. Our plenary review leads us to conclude that the government established a reasonable ground for belief that there was a nexus between the seized property and the illegal narcotics activity. We uphold the determinations of both district court judges that the original complaint and affidavit met the probable cause threshold.

Following the standard set forth above, we must conclude that the government met its burden of establishing probable cause. The burden then shifted to Mrs. Penny to demonstrate that the defendant property was not used in connection with drug activities. See *United States v. Michelle's Lounge*, 39 P.3d 684, 700 (7th Cir. 1994) ("The claimant, of course, must bear the burden of proving the absence of probable cause; any other allocation of

proof is prohibited by the statute."); *United States v. Fleming*, 677 F.2d 602, 609 (7th Cir. 1982) (describing claimant's burden to show that currency obtained in drug trafficking was not "furnished or intended to be furnished . . . in exchange for a controlled substance"). Mrs. Penny made no such showing. The district court might have determined at that point that Mrs. Penny had failed to rebut the government's proof of probable cause; it then could have held that the original showing of probable cause supported a forfeiture judgment. See *On Leong*, 918 F.2d at 1292 (summary judgment appropriate when the government establishes probable cause and claimant fails to show the facts constituting probable cause did not exist). However, the government presented further evidence to bolster its forfeiture claim, in the form of an amended verified complaint and affidavit, and then sought summary judgment. Mrs. Penny responded with affirmative defenses, but those defenses failed to persuade the district court, and she has not appealed those rulings. Mrs. Penny failed to respond to the government's 12(m) statement; therefore she has in fact admitted that the properties were purchased with illegal proceeds from narcotics trafficking or were used to facilitate the drug trade.[14] Mrs. Penny's belated challenge to the probable cause determination, in the motion to reconsider, provides no basis for holding that the district court abused

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[14] Claimants admit they failed to respond to the government's 12(m) statement, but insist that, even by admitting those "facts," they did not admit that the government had satisfied the probable cause burden because it was based on such unreliable hearsay evidence. As we demonstrated above, this position is completely without merit.

its discretion. The motion for reconsideration was properly denied.

B. Denial of Motion for Continuance

Claimants submit that the district court abused its discretion by denying their request for a continuance. They contend that, although their request was not accompanied by the required Rule 56 affidavit, they had presented a good-faith reason for the continuance: that the government had seized all their records by which they could establish a defense to the forfeiture action. In their reply brief, claimants argue that the denial of that request for a continuance may deprive them of an adequate opportunity to be heard.

We review the denial of a continuance motion for abuse of discretion. *On Leong*, 918 F.2d at 1294. A party seeking the protection of Rule 56(f)[15] must make a good faith showing that it cannot respond to the movant's affidavits. Id. at 1295. The rule requires the filing of an affidavit stating the reasons for a claimant's inability to submit the necessary material to the court. In this case, claimants did not file the required affidavit. In addition,

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[15] The rule upon which the claimants rely provides:
Rule 56. Summary Judgment
(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

the district court stated, their request for additional time to examine boxes of documents lacked specificity concerning what information they hoped to uncover and how it would refute the government's showing of probable cause. The record indicates that claimants were also dilatory in conducting discovery and had failed to review the documents at issue when given the extra time for their examination. See *United States v. Bob Stofer Oldsmobile-Cadillac, Inc.*, 766 F.2d 1147, 1153 (7th Cir. 1985) ("A party who has been dilatory in discovery may not use Rule 56(f) to gain a continuance where he has made only vague assertions that further discovery would develop genuine issues of material fact."). For those reasons the court did not abuse its discretion in refusing a continuance at the summary judgment stage.[16]

C. Lack of Predeprivation Hearing

Finally, the claimants submit that there should have been an adversary hearing before their property was seized. They rely on the Supreme Court's pronouncement in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993). They admit that they raised the issue in the district court only in their reply brief in support of the motion to reconsider, but note that the Supreme Court did not decide the *Good* case until after they had filed the motion for reconsideration. Therefore, the reply was their

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[16] *Cf. Zayre Corp. v. S. M. & R. Co.*, 882 F.2d 1145, 1149 (7th Cir. 1989) (stating that, when record shows that underlying records were made available and affidavit was never filed requesting continuance, company cannot complain about burden that inspecting underlying records would have imposed).

first opportunity to invite the attention of the district court to this important development in the law of forfeiture. We agree with the claimants that, because they raised the matter at the first opportunity, it cannot be considered waived. We also agree, in concert with the other appellate courts that have applied *Good* retroactively, that the holding in *Good* is applicable to this case as it is to all cases not final on the date of the Supreme Court's decision.[17] We have no quarrel with those decisions.

The district court did not dispute the applicability of *Good* to this case. Rather, it declined to consider its application at such a late stage in the proceedings. In declining to address the merits of the claimants' damages argument, the district court stated:

> As final judgment has been entered in this case and we are not going to disturb that judgment, we will not entertain Penny's argument that she is entitled to damages because she did

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[17] *United States v. Real Property Located at 20832 Big Rock Dr.*, 51 F.3d 1402, 1405-06 (9th Cir. 1995); *United States v. One Parcel of Real Property, Located at 9638 Chicago Heights*, 27 F.3d 327, 329 (8th Cir. 1994); *see also United States v. Certain Real Property Located at 16510 Ashton*, 47 F.3d 1465, 1470 (6th Cir. 1995) (finding that earlier circuit decisions were superseded by *Good;* applying it to the case before it); *United States v. Premises Known as RR #1, Box 224, Dalton*, 14 F.3d 864, 869 n.5 (3d Cir. 1994) (acknowledging applicability of Good, noting that parties have not raised it). We note that our circuit has implicitly acknowledged the retroactive applicability of *Good in Michelle's Lounge*, 39 F.3d at 702. In that case the government, after *Good* was decided, stopped collecting rent on the defendant property and returned the rent paid.

> not receive a pre-seizure hearing as found necessary by the Supreme Court in *U.S. v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993). She may file suit seeking damages if she desires to pursue this course and is satisfied that *James Daniel* Good applies retroactively.

Memorandum Opinion of January 25, 1994, R.208 at 8-9. A motion for a new trial or to alter or amend the judgment is committed to the sound discretion of the district court.[18] Consequently, we approach our assessment of the district court's ruling with great deference. Nevertheless, several considerations, in addition to a general concern for judicial economy, compel us to conclude that the district court's approach to the late arrival of *Good* on this litigation scene cannot be affirmed. First, as we have noted earlier, we agree that the holdings of the other circuits that *Good* applies retroactively are correct. Therefore, although the district court left the matter open, we are satisfied that *Good* applies to this case. Second, our independent examination of the record reveals that the district court misapprehended the gist of the claimants' argument. Although their position is not stated in the clearest of terms, we believe that, fairly read, the claimants' contention was broader than that perceived by the district court. We read the reply to the motion for reconsideration and the briefs filed in this court to argue that *Good* requires the nullification of the forfeiture order because of the failure of the district court to provide an adversary hearing. As an alternate position, the claimants

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[18] *Moore v. State of Indiana*, 999 F.2d 1125, 1128 (7th Cir. 1993); *Walden v. Illinois Cent. Gulf R.R.*, 975 F.2d 361, 365 (7th Cir. 1992).

argue that *Good* at least requires that they be paid compensation for the seizure of their realty by an ex parte order.

We are persuaded that a preferable approach is the one taken by our colleagues in the Sixth Circuit in United *States v. Real Property Known and Numbered as 429 South Main Street*, 52 F.3d 1416 (6th Cir. 1995). In that case, through the pen of Judge Boggs, the Sixth Circuit, in reviewing a summary judgment granting a forfeiture such as the one before us, required that the district court revisit the correctness of its judgment because of the intervening decision in *Good*. Despite the fact that the claimants did not raise the applicability of *Good* in the district court, the Sixth Circuit determined that the possibility of a miscarriage of justice required that the district court address *Good* in reaching its judgment on the forfeiture issue. We believe that the approach outlined by Judge Boggs in *429 S. Main Street* is sound as a matter of logic and as a matter of judicial economy. We therefore believe that the district court ought to resolve, at this juncture, the impact of *Good* on this forfeiture action.

To permit the district court to accomplish this task with dispatch, we offer, in the interest of judicial efficiency, the following guidance. As we have noted above, the claimants suggest, albeit with some obliqueness, that *Good* requires an adversary hearing not only with respect to the realty that was listed in the complaint, but also to the remainder of the property with respect to which the

government sought forfeiture. *Good* involved the forfeiture of realty:

> In sum, based upon the importance of the private interests at risk and the absence of countervailing Government needs, we hold that the seizure of real property under § 881(a)(7) is not one of those extraordinary instances that justify the postponement of notice and hearing. Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.

*Good*, 114 S. Ct. at 505. Nevertheless, the Court's notation that it "tolerate[d] some exceptions to the general rule requiring predeprivation notice and hearing" in extraordinary situations in which important governmental interests were at stake, id. at 501, might suggest that the holding in *Good* will later spread its dominion to property other than realty.[19] Several of our colleagues in other circuits have intimated that the issue is an open

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[19] The Court, surveying its prior decisions, presented a spectrum within which to place the seizure of realty. It noted that assets susceptible to removal, destruction or concealment could be seized without affording prior notice or hearing. 114 S. Ct. at 500 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)). However, the seizure of kitchen appliances and household furniture required a predeprivation hearing. Id. at 501 (citing *Fuentes v. Shevin*, 407 U.S. 67, 70-71 (1972)). Moreover, the Court noted that it had found unconstitutional a state statute authorizing the attachment of real estate without prior notice or hearing. Id. (citing *Connecticut v. Doehr*, 501 U.S. 1 (1991)). Because the "seizure of a home produces a far greater deprivation than the loss of furniture, or even attachment," id., it concluded that predeprivation notice and hearing were necessary in the absence of extraordinary circumstances.

one.[20] In this case, however, extending *Good* to property other than the realty at stake seems, at best, a difficult task for the claimants. The other property – bank accounts and automobiles – possesses attributes of liquidity and mobility that would make the possibility of conversion substantial.[21] Therefore, it would appear that the considerations that justified the seizure of the yacht in *Calero-Toledo*, 416 U.S. at 679,[22] would also permit initial seizure on an ex parte basis here. Because this matter has never been addressed by the district court, a proper respect for its prerogatives requires that we permit it to address the issue if the defendants should choose to pursue the issue. However, we emphasize that, in evaluating any such submission by the defendants, the district court must give considerable weight to the

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[20] *See, e.g., 429 S. Main St.*, 52 F.3d at 1419-20 (discussing the *Good* Court's recognition that not all forfeitures require a hearing); *Board of Governors of the Fed. Reserve Sys. v. DLG Fin. Corp.*, 29 F.3d 993, 1001 (5th Cir. 1994) (applying *Good's* "exigent circumstances" definition and *Mathews* balancing test to hold that, following broad assets freeze, a postdeprivation hearing was sufficient to satisfy due process); *Organizacion JD Ltda. v. U.S. Dept of Justice*, 18 F.3d 91, 94 (2d Cir.), cert. denied, 114 S. Ct. 2679 (1994) (noting that *Good* did not address whether personal property, like realty, was protected by the Fifth Amendment).

[21] We note that the government's motion seeking to file this case under seal stated: "Many of the assets which are the subject of this forfeiture complaint are mobile or liquid or can be easily liquidated if the owners of the property learn of the filing of this complaint prior to service of the warrant. Additionally . . . many of the assets may be concealed and therefore unavailable for forfeiture." R.5.

[22] In *Good*, the Supreme Court noted with approval the use of ex parte seizure in *Calero-Toledo*. *See* 114 S.Ct. at 502-03.

possibility of the property's disappearing if the government is not allowed to proceed on an ex parte basis.

There can be no question that the holding in *Good* applies to realty. However, the Supreme Court was careful to note that, even with respect to this property, there may be times when exigent circumstances will excuse the necessity of a hearing. The existence of such circumstance is a fact-specific issue that ought to be raised and litigated in the district court. On remand, the government is free to rely on this exception. We note that the Supreme Court has made clear in *Good* that this exception may be established only if the government can demonstrate that less restrictive alternatives such as a lis pendens are not realistic measures for the protection of the government's interest in preventing the sale, destruction or continued illegal use of the real property. *Good*, 114 S. Ct. at 505.

We also believe that it is appropriate to provide, the assistance of the district court, guidance with respect to the available remedies for a failure to provide notice and hearing before seizure. As Judge Kozinski noted *United States v. Real Property Located at 20832 Big Rock Drive*, 51 F.3d 1402 (9th Cir. 1995), the cases reflect some difference in approach on this issue. The Eighth Circuit is of the view that *Good* requires dismissal of the forfeiture action with leave to file a new action if the statute of limitations has not run. *See One Parcel of Real Property, Located at 9638 Chicago Heights*, 27 F.3d 327, 330 (8th Cir. 1994). The Second, Third, and Ninth take the view that the illegal seizure does not, standing alone, require that the property be immune from forfeiture. *See 20832 Big Rock Dr.*, 51 F.3d at 1406; *United States v. Premises Known as RR #1*, 14 F.3d 864, 86 n.5 (3d Cir. 1994); *United States v. Premises and*

*Real Property at 4492 South Livonia Rd.*, 889 F.2d 1258, 1265-66 (2d Cir. 1989). Under this view, the government is responsible, however, for the profits of which the claim was deprived during the period of illegal seizure. We believe that this latter approach provides an effective, but measured, remedy for the violation of the claimant's right. It is the responsibility of the courts to construct a remedy for a constitutional violation that is tailored to the injury caused by the violation. *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) ("[T]he scope of the remedy is determined by the nature and extent of the constitutional violation."). We believe that the approach of the majority of the circuits reflects that guiding principle.

## Conclusion

For the foregoing reasons, we affirm in part the judgment of the district court and remand the case for proceedings consistent with this opinion. On remand the district court is directed to determine whether there were exigent circumstances justifying the seizure of the claimants' real property without an adversary hearing. If the district court determines that such exigent circumstances did not exist, it must determine the damages, if any, suffered by the claimants as a result of the deprivation of their real property from the date of the seizure to the date of the first adversary hearing. If the claimants persist in their contention that other seized property was not subject to forfeiture on an ex parte basis, the district court will evaluate that claim according to the methodology

outlined in *Good*. The parties will bear their own costs in this court.

AFFIRMED IN PART AND REMANDED IN PART

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | |
| V. | ) | |
| ALL ASSETS AND EQUIPMENT OF WEST SIDE BUILDING CORPORATION, et al., | ) | 89 C 2736 |
| Defendants. | ) | |
| v. | ) | |
| CLARA PENNY and WEST SIDE BUILDING CORPORATION, | ) | |
| Claimants. | ) | |

## MEMORANDUM OPINION

**CHARLES P. KOCORAS,** District Judge:

This matter is before the Court on the government's motion for summary judgment of forfeiture pursuant to 21 U.S.C. § 881(a)(4), (6), and (7). For the reasons that follow, we grant the motion.

## BACKGROUND

This is a drug-related forfeiture action. The plaintiff is the United States Government. The government alleges that the defendant properties were acquired or improved with proceeds from illegal drug activity and/or were used to facilitate felony drug offenses. This Court (Grady, J.) found probable cause to believe that the property was

subject to forfeiture and issued an order April 4, 1989 on the government's ex parte motion, allowing the government to seize the defendant property.

Clara Penny ("Penny") was the only owner to file a verified claim to the defendant property. She filed claims as an individual and as the president of West Side Building Corporation.[1] Penny's husband, Jonathan Penny, did not file a claim within the allotted time and therefore, a default judgment of forfeiture of his interests in the defendant assets was entered by this Court on August 15, 1990.Penny stated several defenses in her answer to the verified complaint.

Penny stated that two parcels of real estate and two vehicles were acquired before the effective date of the forfeiture statute; that three parcels of real estate were not purchased by Penny or West Side Building Corporation but were gifts from Penny's father; and that one vehicle was not purchased by Penny or West Side but was a gift to Penny and her husband.[2] Further, she stated that two vehicles were purchased with funds from Penny's credit union.

Penny responded to interrogatories on July 26, 1990. The government deposed Penny April 7, 1992. At the

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[1] Because Penny in this case represents both herself in her individual capacity and West Side as its president, our Opinion will bind both Penny and West Side.

[2] We note that this defense, if proven, would be an effective defense to the claim that this property was acquired from the proceeds of narcotics activities, but would not be an effective defense to the section 881(a)(4) and (7) claims regarding use of the property to facilitate narcotics activities.

deposition, Penny asserted her Fifth Amendment privilege against self-incrimination in response to all questions relevant here. Penny states that her reason for doing so was that she was told that she was the subject of a grand jury investigation, that indictments had been returned, and that her testimony could be used against her in a criminal proceeding. Penny's Response, at 5. Penny was not, in fact, indicted, but her husband was. Jonathan Penny was convicted on September 10, 1993 in a jury trial on both counts of a two-count indictment. The indictment charged violations of 21 U. S. C. § § 841 (a)(1) and 846. Jonathan Penny was found guilty of selling, distributing, or dispensing narcotics and conspiracy to do the same.

The government now seeks summary judgment of forfeiture of Penny's interests in the defendant assets. The government's Local Rule 12(m) Statement cites its Amended Verified Complaint and the affidavit of Lawrence Evans, which was submitted with the Amended Verified Complaint.

## LEGAL STANDARD

Summary judgment is appropriate if the pleadings, answers to interrogatories, admissions, affidavits, and other materials show that there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Only those disputes over facts that might affect the outcome of the suit under the governing law properly prevent a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue exists if

there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Id.* at 249.

The party seeking summary judgment has the initial burden of showing that no such issue of material fact exists. When a properly supported motion for summary judgment has been made, the opposing party must then "set forth specific facts showing that there is a genuine issue for trial." *Cooper v. Ford Motor Co.*, 748 F.2d 677 (Fed. Cir. 1984). The opposing party is entitled to the benefit of all favorable inferences that can reasonably be drawn from the underlying facts, but not every conceivable inference. *De Valk Lincoln Mercury, Inc. v. Ford Motor Co,,* 811 F.2d 326, 329 (7th Cir. 1987). It is in consideration of these principles that we turn to the present motion for summary judgment.

## DISCUSSION

At the outset, we wish to acknowledge the candor displayed in Penny's brief regarding unfavorable precedent. While this integrity should not be cause for comment, unfortunately, we see far too little of it. In support of its motion, the government states that the earlier finding of probable cause for forfeiture in this case shifts the burden of proof to Penny to prove by a preponderance of the evidence that the defendant property is not subject to forfeiture. *See United States v. Certain Real Property,* 943 F.2d 721, 725 (7th Cir. 1991). The government argues that we can infer that Penny is unable to meet this burden from the fact that she invoked the Fifth Amendment during her deposition.

Penny raises several points in opposition to the government's motion for summary judgment. First, she argues that she is unable to properly respond to the motion because the relevant documents were seized by the government. Next, she urges that the government has not set forth facts establishing a nexus between the defendant properties and activities justifying forfeiture. Therefore, she requests a continuance pursuant to Rule 56(f). Penny also seeks a grant of immunity from prosecution for criminal acts for any testimony she gives regarding the defendant properties. Finally, she argues that the forfeiture of all the defendant properties is disproportionate to any crime and therefore violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Initially, we will consider the Rule 56(f) continuance requested by Penny. Federal Rule of Civil Procedure 56(f) authorizes the District Court to grant a continuance to allow a party against whom a summary judgment motion has been filed to take discovery to obtain information necessary to respond to the motion. To obtain such relief, the party seeking it must set forth in affidavits reasons why it cannot produce affidavits supporting its opposition of the summary judgment motion. Fed. R. Civ. P. 56(f).

We will not grant relief to Penny under Rule 56(f) because she has not complied with the procedure for obtaining such a continuance. Penny did not file an affidavit explaining why she cannot produce evidence to oppose the motion. Penny states a plausible reason in her memorandum: that the relevant documents are in the possession of the government, and that her counsel must search through 14 boxes of documents to find the relevant ones. However, a memorandum is not an affidavit, and

Penny does not indicate why this search process was not even begun yet. Further, we note that this same excuse was tendered last year when Penny did not appear for her scheduled deposition. At that time, we allowed time for those documents to be reviewed. We are not inclined to do so here, where Penny ignores the procedural steps for obtaining such relief.

Before we can reach the substantive arguments in support of and in opposition to this motion, we must consider another procedural shortcoming by the claimant. The Local Rules of the Northern District of Illinois require the party seeking summary judgment to file a statement of material facts as to which the movant contends there is no genuine issue. Local Rule 12(m). The party opposing summary judgment must respond to the facts set forth in the 12(m) Statement, admitting them or controverting them by specific references to the record. Local Rule 12(n)(1). The party opposing summary judgment must also set forth, with references to the record, any facts that are in dispute and which require the denial of summary judgment. Local Rule 12(n)(2). If the opponent fails to respond as required by Rule 12(n), the facts set forth in the movant's 12(m) Statement are deemed admitted, and summary judgment may be entered for the movant. Here, Penny has not filed a response to the 12(m) Statement; hence, she is deemed to have admitted the facts therein. Summary judgment against her on all claims would be appropriate on these grounds.[3] However, we will also briefly

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[3] Such a result is far from unprecedented. The Seventh Circuit has acknowledged that "[j]udges in the Northern District of Illinois have strictly applied Local Rule 12(n) and its predecessors, 12(m) and 12(f) for a number of years". *Schulz v.*

consider the merits of the arguments raised in her Response Memorandum. That examination will show that summary judgment is also appropriate on the merits.

Once the government has met its burden of showing that probable cause exists, the burden of proof shifts to the property owner to show that the property is not subject to forfeiture. *U.S. v. Certain Real Property*, 943 F.2d 721, 725 (7th Cir. 1991). The standard of persuasion for the owner is a preponderance of the evidence. *Id.* Here, the Court found probable cause. *U.S. v. All Assets & Equipment of West Side Building Corp.*, No. 89C2736, Order at 1 (N.D. Ill. Apr. 4, 1989) (Grady, J.). Penny challenged that finding of probable cause through a motion to dismiss the forfeiture complaint. We denied Penny's motion and refused to disturb Judge Grady's probable cause determination. *U.S. v. All Assets & Equipment of West Side Building Corp.*, No. 89C2736, Order at 4 (N.D. Ill. July 14, 1989) (Kocoras, J.). Thus, the government's burden being met, we now evaluate Penny's evidence to determine if she has met her burden.

Penny raised three defenses in her Response Memorandum: lack of knowledge of narcotics activities, acquisition of certain properties before the enactment of the

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*Serfilco, Ltd.*, 965 F.2d 516, 519 (7th Cir. 1992), *citing Zenith Controls, Inc. v. Automatic Switch Co.*, 648 F.Supp. 1497, 1502 (N.D.Ill. 1986); *Home Insurance Co. v. Service America Corp.*, 662 F.Supp. 964, 966 (N.D.Ill. 1987); *Davis v. Frapoliy*, 756 F.Supp. 1065, 1069 (N.D. Ill. 1991). Furthermore, the Seventh Circuit has repeatedly upheld lower courts' strict enforcement of Rule 12(n). *Schulz*, 965 F.2d at 519, *citing Maksym v. Loesch*, 937 F.2d 1237, 1240-41 (7th Cir. 1991); *Bell, Boyd & Lloyd v. Tapy*, 896 F.2d 1101 (7th Cir. 1990).

forfeiture statute, and acquisition with legitimate income. The first defense is known as the "innocent owner" defense. Section 881(a)(7) states that an owner's interest in real property will not be forfeited if that owner establishes that the illegal conduct occurred without that owner's "knowledge or consent."[4] Here, Penny did not submit an affidavit claiming that she did not know of or consent to narcotics activities on the defendant properties, nor did she point out any other evidence in the record to support an innocent owner defense. Although Penny did not direct our attention to anything in the record, we examined her Verified Claim of Ownership, which did not reveal any claim that Penny was an innocent owner. For these reasons, Penny has not met her burden on summary judgment of pointing out specific evidence raising a genuine issue of material fact. *See Celotex Corp.v. Catrett*, 477 U.S. 317, 322 (1986); *compare U.S. v. Lot 9. Block 2 of Donnybrook Place*, 919 F.2d 994 (5th Cir. 1990) (reversing grant of summary judgment because affidavit of owner raised a triable issue regarding innocent owner defense).

Penny's second defense, that certain properties were acquired before the effective date of the forfeiture statute,

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[4] We are aware of the ambiguity in the wording of section 881(a)(7) - that is, can an owner who has knowledge but does not consent to the use be an innocent owner? See *U.S. v. One Parcel of Land*, 965 F.2d 311, 315 (7th Cir. 1992) (discussing split in circuits on interpretation of section 881(a)(7)). However, as Penny has not alleged either lack of knowledge or lack of consent, it is not necessary for us to confront the interpretation question.

is supported by answers to interrogatories, which indicate the year properties were bought. Penny also alleges that certain properties were purchased or improved with legitimate income. However, although the date or manner of acquisition may be a defense to a charge under section 881(a)(6) that the property was acquired with proceeds of a drug offense, the date or manner of acquisition is irrelevant to a charge under section 881(a)(7) that the properties were being used to facilitate the commission of a felony drug offense. As the government here seeks forfeiture pursuant to 881(a)(7) of the real property listed below,[5] Penny's second and third defenses are unavailing.

As to the personal property sought under section 881(a)(4), we note that Penny does not introduce any evidence or point to the existence of any documents that might establish that the personal property was not used to facilitate illegal drug activities. As above, she does not provide an affidavit supporting an innocent owner defense. Accordingly, because she has not met her burden to defeat summary judgement, we grant summary judgement as to the personal property sought under section 881(a)(4) as well.

However, as to the property sought exclusively under 881(a)(6), as proceeds of illegal drug activities, the

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[5] The government's Amended Verified Complaint seeks forfeiture of all of the defendant real property pursuant to section 881(a)(7). Amended Complaint 14. Paragraph 12(a) specifically lists the properties at 4901 W. Congress, 1801 W. Adams, 3010 W. Fulton, and 2016 W. Warren. We note that the last property is not listed as a defendant.

acquisition of the property with legitimate income is a relevant defense, even though it is not relevant to the "facilitation" claims under sections 881(a)(4) and (7). Unlike her lack of response to the other claims, here Penny has submitted answers to interrogatories that could form a skeletal basis for a relevant defense that the properties sought were acquired with legitimate income. We use the word "skeletal" because those answers do not actually reflect the source of funds used to purchase the items. However, we will not consider those answers because Penny refused to answer the government's deposition questions concerning the same topics. Penny claimed Fifth Amendment protection against self-incrimination when she was deposed as to her involvement in drug trafficking, the use of defendant properties to facilitate drug trafficking, and the use of illegal drug proceeds to acquire, maintain, and improve the defendant property. While a claimant is entitled to invoke the Fifth Amendment, doing so does not relieve her of her burden of proof. *U.S. v. 15824 West 143rd Street, Lockport, Illinois*, 736 F. Supp. 882, 886 (N.D. Ill. 1990).

It is established that once a witness testifies as to certain facts, she may not invoke the Fifth Amendment to shield that testimony from scrutiny. *U.S. v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir. 1990). "It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination." *McGabtha v. California*, 402 U.S. 183, 215 (1971); *see also Brown v. United States*, 356 U.S. 148, 155-56 (1958). This rule is not limited to trial testimony. *Parcels of Land*, 903 F.2d at 43. This rule has properly been

applied to strike affidavits submitted in response to a summary judgment motion. *See id.* Applying this rule to the instant case, we find it appropriate to strike the interrogatory answers upon which Penny relies, because she refused to answer the government's deposition questions regarding the same subjects. This leaves Penny's response to the summary judgment without any support in the record. Accordingly, we grant summary judgment with regard to the property sought to be forfeited under 881(a)(6) as well.

Penny also seeks a grant of immunity from prosecution for criminal acts for any testimony she gives regarding the defendant properties. She claims that she is caught in a dilemma between incriminating herself and forfeiting substantial property holdings. This Scylla and Charybdis situation has been addressed in several other cases. *See, e.g., U.S. v. Certain Real Property,* 986 F.2d 990 (6th Cir. (1993); *U.S. v. One 1985 Plymouth Colt Vista,* 644 F. Supp. 1546 (N.D. Ill. 1986) and cases cited therein. In One 1985 Plymouth Colt Vista, Judge Shadur observed that granting immunity to a claimant in a civil forfeiture proceeding is "plainly unacceptable," because that would have the effect of allowing a claimant to convert the privilege against self-incrimination "from [a] shield. . . . into a sword." 644 F. Supp. at 1553 (quoting *U.S. v. Rylander,* 460 U.S. 752 (1983)).

Moreover, because Congress has delegated the authority to grant use immunity to the executive branch of government, *U.S. v. Taylor,* 728 F.2d 930,934 (7th Cir. 1984) (citing 18 U.S.C. § 6003), district courts are without power to direct the prosecution to grant use immunity to secure testimony that the defense deems relevant. *U.S. v.*

*Smith*, 542 F.2d 711, 715 (7th Cir. 1976). Where, as here, the United States has not exercised its discretion to grant immunity, the district court cannot order such an action at the defendant's request.

Finally, we observe that the Sixth Circuit in *Certain Real Property* affirmed the granting of summary judgment, because the claimant did not develop his "Fifth Amendment Dilemma" argument: he did not explain how the filing of affidavits would prejudice him in a parallel criminal proceeding; he did not indicate what affidavits or depositions would have disclosed; and he did not explain why he could not use the testimony of other persons to substantiate his defense. *Certain Real Property*, 986 F.2d at 996. Likewise here, Penny has not explained how defending against the forfeiture would prejudice her Fifth Amendment rights. Her assertions on pages 6 and 7 of her Response Memorandum purport to do so, but fail to present any substantive reasons. Thus, for all of the above reasons, we find that immunity is not available to Penny.

As an alternative to immunity, Penny asks us to craft some other method to accommodate her Fifth Amendment interests. The First Circuit in *U.S. v. $250,000 in Currency*, 808 F.2d 895 (1st Cir. 1987), stated that such an undertaking is appropriate. However, as just discussed, Penny does not explain how she could provide information to defeat the forfeiture action or how doing so would impinge upon her Fifth Amendment rights. Secondly, she does not suggest what accommodation might be reasonable. This Court in *One Colt Vista* rejected a request for accommodation where the claimant did not suggest reasonable means. 644 F. Supp. at 1553. Penny did suggest

sealing the records of her testimony. However, that is tantamount to granting immunity.

Lastly, Penny raises a defense that the forfeiture sought by the government is out of proportion to the crimes committed. Penny properly cites *Austin v. U.S.*, 113 S. Ct. 2801 (1993) for the proposition that civil forfeitures are subject to Eighth Amendment limitations on excessive fines. First, we observe that *Austin* does not require a proportionality analysis for property acquired as proceeds of illegal drug transactions. If an item is a proceed of an illegal drug transaction, its forfeiture is exclusively remedial, as it cannot be considered punishment to take away something the claimant never legitimately owned. *See Caplin & Drysdale, Chtd. v. U.S.*, 109 S. Ct. 2646, 2652-53 (1989). A proportionality analysis is not required unless the sanction at issue is at least in part punitive. *Austin*, 113 S. Ct. at 2806. *Austin* does apply to property used to facilitate illegal drug activities. However, if we are to perform a proportionality review, we must know the crime committed and balance that against the nature and value of the property sought to be forfeited. As Penny has not provided information as to the former, we cannot perform the proportionality review she seeks.

The summary approval of forfeiture may seem harsh, but we find it is appropriate where, as here, the claimant has not done anything to protect her interests. As discussed above, Penny did not follow the clear rules for seeking a Rule 56(f) continuance, did not support her Response Memorandum with a Rule 12(n) Statement, and did not provide an affidavit or other evidence as required by Rule 56(e) to raise any genuine issue of fact or support

her innocent ownership defense. When a party who is represented by counsel fails to take any of these steps, we are not inclined to grant the relief those avenues could have offered.

## CONCLUSION

For the reasons stated above, we grant summary judgment to the government as to property sought to be forfeited pursuant to sections 881(a)(4), (6) and (7) of Title 21. We order forfeiture of all of the defendant property seized by the government in this action.

Dated: November 23, 1993

Charles P. Kocoras
United States District
Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| UNITED STATES OF AMERICA, Plaintiff, v. ALL ASSETS AND EQUIPMENT OF WEST SIDE BUILDING CORPORATION, et al., Defendants; v. CLARA PENNY, WEST SIDE BUILDING CORPORATION, and ANDERSON AND SONS, Claimants. | ) | No. 89 C 2736 |

## MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This case is before the Court on a motion to reconsider brought by new counsel for the claimants, Clara Penny and West Side Building Corporation (collectively, "Penny"). That motion seeks reconsideration of our entry of summary judgment for the United States in a civil forfeiture proceeding pursuant to 21 U.S.C. §§ 881(a)(4), (6), and (7). For the reasons that follow, we deny the motion to reconsider.

## BACKGROUND

In a Memorandum Opinion dated November 24, 1993, this Court granted the United States' motion for summary judgment, because we found that Penny had not met her burden of proving that the defendant property was not subject to forfeiture. Specifically, we found that Penny had not adduced any evidence of record to support an "innocent owner" defense. Mem. Op. at 8-10. As to Penny's "legitimate acquisition" defense, the only evidence of record was Penny's answers to interrogatories. However, we struck those answers, because Penny later claimed the Fifth Amendment and refused to answer deposition questions regarding the topic. Mem. Op. at II, *citing U.S. v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir. 1990). In the absence of the interrogatory answers, Penny's "legitimate income" defense was likewise unsupported for purposes of *summary* judgment.[1] Moreover, Penny did not submit a statement as required by Local Rule 12(n) disputing any of the facts in the Government's 12(m) Statement; thus, we correctly observed that the facts in the 12(m) Statement were deemed admitted and that summary judgment against Penny would be appropriate on that ground. Mem. Op. at 7.

Nonetheless, we went on to consider the motion on the merits. The Government represented that probable cause was established and thus, the burden of proof shifted to Penny. Penny did not challenge the Government's contention that the burden of proof had shifted to

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[1] The party resisting summary judgment cannot rely merely on the pleadings; thus, a non-moving defendant cannot rely on his answer to the complaint. Fed. R. Civ. P. 56(e).

her. Instead, Penny argued (1) that she was unable to defend the motion because the Government had seized certain papers; (2) that she needed more time to respond for the same reason; (3) that she could introduce evidence about the defendant properties if she were granted immunity from prosecution; and (4) that the forfeiture of the properties was disproportionate to the alleged crime and therefore violative of the Eighth Amendment.

Following entry of judgment, Penny obtained new counsel. On December 2, 1993 in open court, we granted Barry Spevack's motion for the addition of counsel and granted him leave to file a motion to reconsider. That motion argues that there has not been a finding of probable cause and thus, the burden of proof was improperly shifted to Penny. Penny does not introduce evidence to show that there is no probable cause; rather, she argues that the *Government* did not repeat in the 12(m) Statement all of the facts contained in the Amended Complaint. Finally, the motion seeks a hearing regarding damages purportedly due to claimants because the seizure was made without the process found to be due in *U.S. v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993).

## LEGAL STANDARD

Motions for reconsideration are not a matter of routine practice in this jurisdiction. *Settino v. City of Chicago*, 642 F. Supp. 755, 759 (N.D. Ill. 1986). They serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. *Keene Corp. v. International Fidelity Ins. Co.*, 561 F. Supp. 656, 665 (N.D. Ill. 1982), *affd and adopted*, 736 F.2d 388 (7th Cir. 1984).

Motions for reconsideration are not appropriate vehicles to again advance arguments already rejected by the court. *Fisher v. Samuels*, 691 F. Supp. 63, 74 (N.D. Ill. 1988). Nor are they a means to advance new legal theories not argued prior to the ruling. *Keene*, 561 F. Supp. at 666. We turn to the present motion with these principles in mind.

## DISCUSSION

Based on the foregoing case law, it is clear that we could deny the motion to reconsider outright, as it raises a legal argument that clearly could have been raised in Penny's response to the Government's Motion for Summary Judgment. The Government's position that probable cause was established was clearly set forth in its memorandum in support of its motion, yet nowhere in Penny's response did she raise any challenge to probable cause. Nor could she have prevailed on such a challenge, as will be discussed below.

We will first review the law defining probable cause. The Seventh Circuit in *United States v. Edwards* set out the following standards.

> Civil forfeiture proceedings may not be initiated on less than probable cause, but the probable cause threshold in a drug forfeiture case is the same as elsewhere – there must be a reasonable ground for belief of guilt, supported by less than prima facie proof but more than a mere suspicion.
>
> . . .
>
> A direct connection between the property subject to seizure and the illegal activity that

> renders items forfeitable need not be shown in order to establish probable cause. Rather, probable cause analysis looks to the totality of the circumstances surrounding the situation. *Illinois v. Gates*, 462 U.S. 213, 230 (1983). Furthermore, "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Gates*, 462 U.S. at 244 n. 13.

*Edwards*, 885 F.2d 377, 389-90 (7th Cir. 1989).

Here, the evidence available to support a probable cause determination is outlined in the Amended Complaint and the 12(m) Statement. Lawrence Evans, a Task Force Agent, submitted an affidavit detailing information gathered during an investigation of the Pennys and information provided to him by confidential sources and corroborated by investigation. We will only highlight a small portion of that information here. Evans reported that a review of Penny's income tax returns showed income not exceeding $42,000 per year from employment, dividends, interest and capital gains. Yet, the Pennys deposited large amounts of money into bank accounts and stock accounts (over $300,000 during a six-month period in 1985) and led a lavish lifestyle, marked by, inter alia, expensive remodeling and furnishing of their home, acquisition and rehabbing of several other properties, and ownership of eight vehicles, several fur coats, a four-carat diamond, and other expensive jewelry. The Seventh Circuit in *Edwards* stated that,

> where a defendant's verifiable income cannot possibly account for the level of wealth displayed and where there is strong evidence that the defendant is a drug trafficker, then there is

> probable cause to believe that the wealth is either a direct product of the illicit activity or that it is traceable to the activity as proceeds.

*Edwards*, 885 F.2d at 390. Here, Penny's verifiable income cannot possibly account for the level of wealth displayed. There is strong evidence *linking* Penny and her husband to drug dealing. Jonathan Penny, the claimant's husband, was indicted as a result of the investigation described above on charges of violating 21 U. S. C. §§ 841 (a)(1) and 846 and was convicted on both charges on September 10, 1993 following a jury trial. Evans' affidavit states that Clara Penny played a significant role in the drug dealing, particularly while Jonathan was incarcerated. Thus, the requirements outlined in *Edwards* are met and there is probable cause to believe that Penny's wealth and possessions are either a direct product of the illicit activity or that they are traceable to the activity as proceeds and thus, forfeitable under section 881(a)(6).

As to property used to facilitate drug trafficking, we note first that the Seventh Circuit interprets "facilitate" broadly for purposes of civil forfeiture. See *U.S. v. 1990 Toyota 4Runner*, 9 F.3d 651 (7th Cir. 1993). In *1990 Toyota 4Runner*, the Seventh Circuit affirmed an order of forfeiture pursuant to 881(a)(4) of a truck used to transport the claimant to a meeting where a drug deal was planned but not consummated. The Seventh Circuit observed,

> The obvious purpose of the statute read as a whole is to deprive drug traffickers of the principal tools of their trade, which include the drugs themselves, the equipment and raw materials used for their manufacture, the firearms

> used to enforce contracts in an illegal business, the premises used for making and selling drugs – and the vehicles, boats, and aircraft that the traffickers use in their business.

*1990 Toyota 4Runner*, 9 F.3d at 653.

Here, Evans' affidavit clearly indicates that several of the defendant properties had much more direct ties to drug trafficking than did the vehicle in *1990 Toyota 4Runner*. Specifically, the affidavit identifies 4901 West Congress as a location where Penny's son, Michael, was dealing drugs. Evans Aff. para. 5. The affidavit states that the Pennys stored drugs in their residence at 1801 West Adams and consummated drug deals there. Para. 19(a). Two buildings contained drug labs built by Penny: 2126 West Warren and 3010 West Fulton. Paras. 12, 14. Further, a drug deal was consummated at 3010 West Fulton. Para. 10. These activities clearly fit within the "facilitation" definition and the affidavit – uncontroverted by Penny even at this late date, four years after this case was filed – establishes that there exists "a probability or substantial chance of criminal activity" involving these properties. See *Gates*, 462 U.S. at 244 n.13. Thus, probable cause is established for the forfeiture of these real properties pursuant to section 881(a)(7).

Likewise, probable cause for the forfeiture of the 1974 Mercedes Benz pursuant to section 881(a)(4) is established by the fact that Penny's son, Michael, was arrested for transporting heroin in the car. Cf. *Edwards*, 9 F.3d at 652-53.

The party resisting summary judgment must come forward with evidence sufficient to raise a triable issue of

fact. Penny has not done that. The Government introduced a sufficient quantum of evidence to establish probable cause and thus, the burden shifted to Penny. She did nothing to discharge that burden; thus, summary judgment was entered against her. Penny had two opportunities to avoid such a result: she could have attacked the Government's probable cause evidence or she could have introduced evidence establishing innocent ownership or legitimate acquisition. She did neither, and there is nothing in her motion to reconsider that suggests that she intends to do either even if this motion were granted. Accordingly, the motion is denied.

As final judgment has been entered in this case and we are not going to disturb that judgment, we will not entertain Penny's argument that she is entitled to damages because she did not receive a pre-seizure hearing as found necessary by the Supreme Court in *U.S. v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993). She may file suit seeking damages if she desires to pursue this course and is satisfied that *James Daniel Good* applies retroactively.

## CONCLUSION

For the reasons stated above, the claimants' motion to reconsider our entry of summary judgment is denied.

Dated: *January 25, 1994*

Charles P. Kocoras
United States District Judge

(2)

No. 95-397

FILED
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# In the Supreme Court of the United States

OCTOBER TERM, 1995

CLARA PENNY, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
*Solicitor General*
JOHN C. KEENEY
*Acting Assistant Attorney General*
SIDNEY M. GLAZER
*Attorney*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

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## QUESTIONS PRESENTED

1. Whether, in a civil action for forfeiture of real property, the government's failure to provide the owner with notice and an adversary hearing before seizure of the property requires dismissal of the action.

2. Whether the government is permitted to present hearsay evidence when proving probable cause in a civil forfeiture action.

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# In the Supreme Court of the United States

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*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-29, is reported at 58 F.3d 1181. The opinion of the district court granting summary judgment for the government, Pet. App. 30-43, is reported at 843 F. Supp. 377. The opinion of the district court denying the claimants' motion for reconsideration, Pet. App. 44-51, is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 29, 1995. The petition for a writ of certiorari

was filed on September 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In April 1989, the United States initiated this in rem action in the United States District Court for the Northern District of Illinois seeking forfeiture of certain real and personal properties. Pet. App. 2. On the basis of the government's verified complaint and supporting affidavit, the district court determined that there was probable cause to believe that the property described in the complaint was subject to forfeiture under 21 U.S.C. 881(a)(6) and (7). The court granted the government's *ex parte* motion and executed a seizure warrant. Pet. App. 5-6.

The government's complaint alleged, *inter alia*, that the properties were the fruits of a large-scale narcotics trafficking operation run for the past decade by petitioner Clara Penny and her family. According to the complaint, the Pennys' modest legitimate reported income could not explain the acquisition of those assets or the Pennys' lavish lifestyle, and so there was probable cause to believe that the assets constituted proceeds of illicit drug transactions. Pet. App. 2-3.

Accompanying the complaint was the affidavit of Chicago, Illinois, Police Officer Lawrence Evans, a member of the local drug task force that had been investigating the Pennys for several years. Officer Evans reported information that he had received from two informants indicating that Jonathan Penny, the husband of Clara Penny, had been distributing multi-kilo quantities of cocaine since 1980, and had placed numerous properties purchased with drug proceeds in

his wife's name.[1] Officer Evans checked the titles to the Pennys' real estate and automobiles, which revealed that many of their assets were in the name of Clara Penny or petitioner West Side Building Corporation, of which Clara Penny is the sole director. A third source described to Officer Evans the elegant furnishings of the Pennys' home, and the expensive restoration of their other realty. Pet. App. 4-5.

The affidavit of Officer Evans also referred to police records of Jonathan Penny and his son Michael that corroborated their history of drug trafficking; to large deposits of cashier's checks made into the Pennys' bank and stock accounts in 1985 and 1986, and checks for $75,000 written to contractors working on the Pennys' property; and to the Pennys' tax returns which showed that Clara's paycheck as a mail handler was the couple's only legitimate income and that the couple's reported adjusted gross income was far less than their deposits in bank and stock accounts. Pet. App. 5.[2]

Clara Penny filed a verified claim to the property on behalf of herself and the West Side Building Corporation and requested dismissal of the complaint.

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[1] Following the instant forfeiture action, Jonathan Penny was indicted on federal drug trafficking charges. Pet. App. 6 n.6. He is not a party to this civil forfeiture action.

[2] In July 1991, the government filed an amended complaint and another supporting affidavit, also by Officer Evans, providing additional evidence of the nexus between the defendant properties and the Pennys' drug trafficking activities. Pet. App. 7. The district court found, however, that information in the original complaint and affidavit was sufficient to meet the government's probable cause threshold, and the court of appeals affirmed that finding. *Id.* at 18.

The district court denied the motion to dismiss, finding that the government's allegations were sufficiently detailed to comply with pleading requirements in forfeiture actions. Pet. App. 6. The court also declined to disturb its initial finding of probable cause. *Id.* at 7.

The government moved for summary judgment. The district court granted the motion on several grounds. The court noted that Clara Penny had in effect admitted the government's factual statements when she failed to respond to the government's motion by setting forth any facts that were in dispute as required by local rule. Pet. App. 8, 35. The court also noted that it had twice before found that the government had met its burden of demonstrating probable cause, thus shifting the burden of proof to the claimant, but that Clara Penny had done nothing to satisfy that burden. As for the various legal defenses that Penny raised, the court explained why each defense failed. *Id.* at 36-42. Accordingly, the court ordered the petitioner properties forfeited, pursuant to 21 U.S.C. 881(a)(4), (6) and (7). Pet. App. 43.

2. Clara Penny filed a motion for reconsideration, arguing, *inter alia*, that she was entitled to damages because the government had violated her due process rights by seizing her property without notice and hearing. Penny cited the intervening decision in *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993), which held that the Due Process Clause requires the government, in the absence of exigent circumstances, to provide notice and a meaningful opportunity to be heard to the owner of real property before seizing the property in a civil forfeiture proceeding. The district court, however,

denied Penny's motion to reconsider and refused to reach the due process issue raised by *Good*. Pet. App. 44-51. The court stated that Penny was free to file a new lawsuit "seeking damages if she desires to pursue this course and is satisfied that *James Daniel Good* applies retroactively." *Id.* at 51.

3. The court of appeals affirmed in part and remanded in part. The court of appeals affirmed the district court's ruling that the petitioner properties were forfeitable under 21 U.S.C. 881(a)(4), (6) and (7). Pet. App. 1-29. The court of appeals held that the government may rely on hearsay evidence from informants to meet its initial burden of proving probable cause if the evidence is "sufficiently reliable and adequate * * * considering the informant's previous 'track record' and the totality of the circumstances." *Id.* at 18. The court noted that the burden then shifts to the claimant to prove by a preponderance of the evidence that the property is not subject to forfeiture. *Id.* at 18-19. The court concluded that, in this case, the government had clearly established probable cause and that Clara Penny, by failing to respond to the government's summary judgment statements as required by local rule, did nothing to rebut the government's showing.[3]

The court of appeals, however, remanded the case for further proceedings on the due process issue. The court held that *Good* applied retroactively to all cases not final on the date *Good* was issued. Pet. App. 22. The court also gave several instructions for the application of *Good*. First, because *Good* addressed

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[3] The court of appeals also noted that Penny did not appeal the district court's dismissal of any of the legal defenses she raised. Pet. App. 19.

only the forfeiture of real estate, the court of appeals left it for the district court to decide whether *Good* applies to the personal property named in the instant case. Second, since *Good* recognized that "exigent circumstances will excuse the necessity of a hearing," *id.* at 27 (citing 114 S. Ct. at 505), the court of appeals instructed the district court to consider any arguments by the government that exigent circumstances existed here, *ibid.*

Finally, on the issue of a potential remedy, the court of appeals explained that Clara Penny's motion raised not only the issue of damages, but also the contention that the failure to provide a pre-seizure adversary hearing nullified the entire forfeiture action, requiring its dismissal. Pet. App. 23-24. The court of appeals rejected the latter contention. In agreement with the majority of circuits that had considered the issue, the court held that "the illegal seizure does not, standing alone, require that the property be immune from forfeiture." *Id.* at 27. Thus, the court of appeals instructed that if exigent circumstances were not found, the district court was to "determine the damages, if any, suffered by the claimants * * * from the date of the seizure to the date of the first adversary hearing." *Id.* at 28.

## ARGUMENT

1. Petitioners contend that this Court should resolve a conflict over whether, in light of *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993), the government's seizure of forfeitable real property without a hearing requires dismissal of the government's forfeiture action. Pet. 10-13. Review of that issue is not warranted for several reasons.

a. Review by this Court would be premature. In *Good*, this Court held that, in a civil forfeiture action involving real property, the Due Process Clause generally requires the government to provide the property owner with notice and an opportunity to be heard before seizing the property. 114 S. Ct. at 505. But this Court also recognized, as an exception to that rule, that in some cases the presence of exigent circumstances could justify seizure through an *ex parte* motion. *Ibid.*

In this case, the district court had no opportunity to consider whether exigent circumstances could justify the absence of pre-seizure notice and hearing. Accordingly, the court of appeals remanded the case to the district court to decide the exigent circumstances issue. The district court's proceedings on remand are currently pending. If the district court finds that exigent circumstances justified the seizure in this case, and that finding is not reversed by the court of appeals, petitioners' question concerning the appropriate remedy for a *Good* violation would be moot. On the other hand, if the district court finds no exigent circumstances, and that holding is not reversed, petitioners may then present to this Court their claim that dismissal is the only possible remedy. Only then would the question of the appropriate remedy for a *Good* violation be ripe for review in this case.

b. Even if petitioners' claim were ripe for review, the court of appeals correctly held that failure to conduct a pre-seizure adversary hearing does not nullify the entire forfeiture action. As the Second, Third, Ninth, and Tenth Circuits have concluded, the failure to conduct a pre-seizure adversary hearing for the owner results in a temporary deprivation of the

owner's possessory interest in the property, but does not mean that the property is no longer subject to forfeiture. See *United States* v. *Real Property Located at 20832 Big Rock Drive*, 51 F.3d 1402, 1406 (9th Cir. 1995); *United States* v. *51 Pieces of Real Property*, 17 F.3d 1306, 1315-1316 (10th Cir. 1994); *United States* v. *Premises Known as RR # 1*, 14 F.3d 864, 869 n.5 (3d Cir. 1994); *United States* v. *Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258, 1265-1266 (2d Cir. 1989). If the owner suffers a loss as a result of the temporary deprivation, that loss can be compensated, for instance, by the award of any rents that have accrued during the period of the government's wrongful possession. See *20832 Big Rock Drive*, 51 F.3d at 1406; *51 Pieces of Real Property*, 17 F.3d at 1316.[4]

We note that the Eighth and Eleventh Circuits have concluded that a violation of *Good* requires dismissal of the forfeiture action with leave to file a new action if the statute of limitations has not run. See *United States* v. *2751 Peyton Woods Trail, S.W.*, 66 F.3d 1164 (11th Cir. 1995); *United States* v. *One Parcel of Real Property, Located at 9638 Chicago Heights*, 27 F.3d 327, 330 (8th Cir. 1994). But, as the

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[4] These courts also hold that any evidence impermissibly obtained as a result of the illegal forfeiture should be excluded from the forfeiture proceeding. See *20832 Big Rock Drive*, 51 F.3d at 1406; *51 Pieces of Real Property*, 17 F.3d at 1316; *4492 South Livonia Road*, 889 F.2d at 1266. In the instant case, the courts below could not have relied on any impermissibly obtained evidence, despite petitioners' implication to the contrary (Pet. 12), since, as the courts found, the government satisfied its probable cause burden from the information contained in the original complaint and supporting affidavit. Pet. App. 18.

court below concluded: "It is the responsibility of the courts to construct a remedy for a constitutional violation that is tailored to the injury caused by the violation. *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) ('[T]he scope of the remedy is determined by the nature and extent of the constitutional violation.')." Pet. App. 28. The remedy adopted by the Eighth and Eleventh Circuits is inconsistent with that principle, because it provides a windfall for the owner of the property in cases in which an adversary hearing would not have affected the ultimate conclusion that seizure was justified by probable cause. Cf. *United States* v. *Morrison*, 449 U.S. 361 (1981).

c. The conflict would not in any event call for this Court's review. A decision about the remedies available under *Good* is of little practical importance in future cases. It is now settled that the Due Process Clause requires the government, in the absence of exigent circumstances, to provide owners with notice and an opportunity to be heard before seizing real property that is subject to civil forfeiture. *Good*, 114 S. Ct. at 505. The United States has conformed its practices to that principle, and now routinely arranges for such pre-seizure adversary hearings. After the small and diminishing pool of cases that were pending on appeal when *Good* was decided are concluded, the appropriate remedy for a wrongful seizure should not be an issue of continuing importance.

2. Petitioners also contend (Pet. 13-14) that the government should be limited in its use of hearsay evidence to establish probable cause that the property is forfeitable, and in its use of hearsay evidence in the subsequent summary judgment forfeiture proceeding.

As the court below noted, the vast majority of circuits have held explicitly that the government may rely on hearsay evidence when proving probable cause in a forfeiture action.[5] The ruling that hearsay can be used to show probable cause is supported by this Court's holding in *Illinois* v. *Gates*, 462 U.S. 213, 241-242 (1983), that an affidavit may rely on hearsay to establish probable cause for a search warrant, when there is a substantial basis for crediting the hearsay. Petitioners dispute the lower court's finding of indicia of reliability surrounding the hearsay testimony of the government's confidential informants in this case, but that factbound determination does not warrant review by this Court.

Some courts have limited the use of hearsay evidence for purposes that go beyond establishing probable cause to initiate the seizure. For example, in *United States* v. *Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618, 622-623 (3d Cir. 1989), the court held that the government could not use hearsay evidence to rebut the affirmative defense of innocent ownership. In the instant case, however, no

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[5] See, *e.g.*, *United States* v. *One 1973 Rolls Royce*, 43 F.3d 794, 805 (3d Cir. 1994); *United States* v. *Daccarett*, 6 F.3d 37, 56 (2d Cir. 1993), cert. denied, 114 S. Ct. 1294, 1295, 1538 (1994); *United States* v. *One 1982 Chevrolet Corvette*, 976 F.2d 392, 392 (8th Cir. 1992); *United States* v. *One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496, 1501 (11th Cir. 1992); *United States* v. *One 1986 Chevrolet Van*, 927 F.2d 39, 42 (1st Cir. 1991); *United States* v. *One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990); *United States* v. *One Parcel of Real Estate Located at 7715 Betsy Bruce Lane*, 906 F.2d 110, 113 (4th Cir. 1990); *United States* v. *Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618, 622 (3d Cir. 1989); *United States* v. *$5,644,540 in U.S. Currency*, 799 F.2d 1357, 1362 (9th Cir. 1986).

use of hearsay evidence took place beyond establishing probable cause. Once probable cause was established, the burden shifted to petitioner Penny, and she offered no counter-evidence. Petitioners do not challenge the principle that "[i]f the claimant fails to rebut the government's proof, that showing of probable cause alone will support a judgment of forfeiture." Pet. App. 16 (citing cases). Moreover, the courts below held that Penny in effect admitted the factual statements in the government's motion for summary judgment by failing to set forth any facts that were in dispute as required by local rule. Petitioners do not contest that holding. Accordingly, this case is not a proper vehicle for addressing questions about the use of hearsay evidence after probable cause has been established.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
*Solicitor General*

JOHN C. KEENEY
*Acting Assistant Attorney General*

SIDNEY M. GLAZER
*Attorney*

NOVEMBER 1995